In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-978

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.,
Petitioners,

v.

RUSSELL E. TRAIN, as Administrator,
Environmental Protection Agency, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS[1]

Opinions Below

The opinion of the court of appeals (App. 240; Pet. in No. 75-978, Appendix A)[2] is reported at 528 F.2d 1136. The opinion and order of the district court (App. 219; Pet. in No. 75-978, Appendix B) is reported at 383 F. Supp. 1244.

[1] Petitioners in No. 75-978 are E. I. du Pont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, The Dow Chemical Company, Allied Chemical Corporation, and Hercules Incorporated.

[2] Throughout this brief, citations to the Single Appendix will be designated "App. ——." An exhibit volume of the Appendix has also been prepared, comprising a reproduction of two lengthy EPA-issued documents which are part of the administrative record in this case. This exhibit volume will be cited as "Ex. R. ——." In addition, in this brief citation will be made to certain portions of the original record on file with the Court which have not been reproduced in the Appendix. Where those portions of the record stem from the certified index of the administrative record filed by EPA with the court of appeals, the citation will appear as "R. ——." Such citations will reflect EPA's original pagination of the administrative record. This pagination by EPA of the administrative record was also used throughout the proceedings in the court of appeals. A complete copy of the administrative record is on file with the Clerk of this Court.

The decision by the court of appeals was the first opinion by that court in a consolidated proceeding. The second opinion of the court of appeals (App. 253; Pet. in No. 75-1473, Appendix A) has not yet been officially reported. It is unofficially reported at 8 E.R.C. 1718. The second decision is the subject of writs of certiorari numbered 75-1473 and 75-1705.[3]

Jurisdiction

The first judgment of the court of appeals (App. 252; Pet. in No. 75-978, Appendix A at 13a) was entered on December 30, 1975. The petition for writ of certiorari in No. 75-978 was filed on January 12, 1976, and was granted by this Court on April 19, 1976.

The second judgment of the court of appeals (App. 287-289; Pet. in No. 75-1473, Appendix A at 35a to 37a) was entered on March 10, 1976. On April 13, 1976, the petition for writ of certiorari in No. 75-1473 was filed respecting the second decision; this petition was granted by this Court on June 21, 1976. A cross-petition for writ of certiorari (No. 75-1705) was filed on May 24, 1976, and was also granted by this Court on June 21, 1976.

On June 21, 1976, this Court denied petitioners' motion to consolidate the cases numbered 75-1473 and 75-1705 with No. 75-978. The Court did consolidate Nos. 75-1473 and 75-1705, and ordered those cases to be argued "in tandem with No. 75-978", the present case.

Simultaneously with the filing of this brief, petitioners are filing the opening brief in Nos. 75-1473 and 75-1705.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

[3] Petitioners in No. 75-1473 and Cross-Respondents in No. 75-1705 are the eight companies listed *supra*, at 1 n. 1, plus Union Carbide Corporation, Stauffer Chemical Company, Diamond Shamrock Corporation, PPG Industries, Incorporated, BASF Wyandotte Corporation, Cities Service Company, and N L Industries, Incorporated.

Questions Presented[4]

1. Whether the Federal Water Pollution Control Act, as amended, provides that regulations governing wastewater effluent discharges from existing plants be issued in the form of

(a) "effluent limitations" based upon an authorization said to be implied from Section 301(b) of the Act, or

(b) "guidelines for effluent limitations" in compliance with the express command of Section 304(b) of the Act.

2. Whether district courts or courts of appeals have initial jurisdiction to review regulations issued by the Administrator of the Environmental Protection Agency under the Federal Water Pollution Control Act, as amended, governing wastewater effluent discharges from existing plants.

3. Whether when "the Act is not clear" in conferring initial jurisdiction to review regulations for existing plants upon the courts of appeals rather than in providing the normal review in the district courts, the statute should be construed on grounds of practicality to confer such initial jurisdiction on the court of appeals.

Statutes And Regulations Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 101, 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 of the Act (33 U.S.C. §§ 1251, 1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369) are set forth in Appendix A to this brief, *infra* (separately bound), at 1a–42a.

2. *"Effluent Limitations Guidelines" and "Standards Of Performance For New Sources" for the Inorganic Chemicals Manufacturing Point Source Category.* The regulations issued by the

[4] The same questions are presented to this Court in both Nos. 75-978 and 75-1473.

The cross-petition in No. 75-1705 presents the further question whether standards of performance promulgated under Section 306 of the Act to control effluent discharges from sources constructed after the publication of proposed standards ("new sources") are "presumptively applicable" to rather than always binding on such sources, such that the Agency must provide a "safety valve procedure" enabling individual new sources to obtain limitations in a permit different from the standards upon an appropriate factual showing.

Administrator which govern the wastewater effluent discharges from existing plants and from new sources in the Inorganic Chemicals Manufacturing Point Source Category are found at 40 C.F.R. Part 415, *added by* 39 *Fed. Reg.* 9611-9635 (March 12, 1974). They are set forth in Appendix B to this brief, *infra*, at 1b–79b.

3. *"Effluent Guidelines and Standards–General Provisions"*.

The regulations issued by the Administrator to provide general provisions applicable to effluent guidelines for existing sources and to standards of performance for new sources for the various industry categories including the inorganic chemicals category are found at 40 C.F.R. Part 401, *added by* 39 *Fed. Reg.* 4531-4533 (February 4, 1974). They are set forth in Appendix C to this brief, *infra*, at 1c–9c.

STATEMENT OF THE CASE

This case and the related cases (Nos. 75-1473 and 75-1705) specifically involve the Environmental Protection Agency's regulations and standards for wastewater effluents from facilities in the inorganic chemicals industry.[5] They present issues of the proper construction to be accorded key sections of the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. §§ 1251 *et seq*. The substantive issues concern both the effluent regulations for existing plants and the effluent standards for new sources. The questions respecting the existing plant regulations in this case and in No. 75-1473 are wide-ranging: at issue is the nature of the statutory authority granted by Congress to the Administrator of the Environmental Protection Agency ("EPA" or "Administrator" or "the Agency") to issue regulations governing wastewater effluent discharges from existing industrial plants and other existing facilities. For the new source standards, No. 75-1705 presents the much more limited issue of whether such standards should have built into

[5]These proceedings relate only to the effluent regulations applicable to "discharge of a pollutant" from "point sources." See § 502(11), (14) and (16), 33 U.S.C. § 1362(11), (14) and (16). Other sections of the statute and of the regulations deal with standards applicable to pretreatment of wastewater before it may be discharged to a publicly owned treatment system (*e.g.*, that of a municipality). (§ 307(b), (c), 33 U.S.C. § 1317(b), (c).)

them a modest "safety valve" to account for unanticipated factual situations.

Intertwined with the substantive issues for existing plants is the jurisdictional question of whether actions to review EPA's effluent regulations for existing plants should be brought as an initial matter in the district courts or whether they should be brought in the courts of appeals.[6] No jurisdictional issue arises in conjunction with review of the new source standards.

Resolution of both the statutory and the jurisdictional questions in these cases depends upon the detailed provisions of the Federal Water Pollution Control Act, as amended, upon the legislative history underlying the 1972 Amendments which rewrote the Act, and upon the course of EPA's rulemaking efforts to establish effluent regulations for existing and for new inorganic chemical plants purportedly in satisfaction of key provisions of the Act.

A. The Statutory Framework

In October 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92-500, 86 Stat. 816). These Amendments constituted a basic and extensive revision of the Federal Water Pollution Control Act.

As thus amended, the Act constitutes the organic statute under which all effluent discharges from industrial plants and municipalities are regulated.

[6] The jurisdictional question presents no bar to the Court's consideration of the substantive statutory-construction issues relating to the nature of the regulations for existing plants. These related cases reflect the alternative jurisdictional predicates. No. 75-978 arises on an action begun initially in district court. Nos. 75-1473 and 75-1705 stem from a consolidated series of actions filed originally in the court of appeals. The statutory-construction issues were raised in both sets of proceedings. Moreover, the Court must necessarily consider and resolve the statutory issues to decide whether initial jurisdiction of an action to review EPA's existing source regulations lies in the district courts or in the courts of appeals. See *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132 (1940); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968); cf. *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell* v. *Hood*, 327 U.S. 678 (1946).

1. *A general prohibition with specific permits.*

The structure of the Act is based on a general prohibition of discharges except as they are permitted under the law. (§ 301 (a), 33 U.S.C. § 1311(a).) Permits for effluent discharges are issued under Section 402 of the Act, 33 U.S.C. § 1342, and the limits and conditions which restrict the discharge of an individual industrial plant are fixed in the permit after proceedings conducted under Section 402.[7] Unless a plant has a permit, no effluent discharges are lawful.[8]

The permit procedure is based on the congressional policy that the primary responsibility for water quality protection shall rest with the States. (§ 101(b), 33 U.S.C. § 1251(b).) When a State's permit program meets the requirements of the Act, as determined by the Administrator, the statute provides that the permit granting authority automatically passes to the State from EPA. See § 402(b)-(f), 33 U.S.C. § 1342(b)-(f); *Environmental Protection Agency* v. *California*, __U.S.__, 44 U.S.L.W. 4781, 4782-4783 (U.S., June 7, 1976). As of July 1, 1976, twenty-seven (27) States had qualified and now administer the permit program within their respective jurisdictions.[9] In the

[7] These are the effluent limitations defined by Section 502(11), 33 U.S.C. § 1362(11):

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

[8] The statute provided, however, that prior to December 31, 1974, if a permit application was pending without dispositive action, effluent discharges from existing plants did not violate the Act. (§ 402(k), 33 U.S.C. § 1342(k).)

[9] These States are:

STATE	DATE OF APPROVAL	FEDERAL REGISTER NOTICE OF APPROVAL
California	May 14, 1973	39 *Fed. Reg.* 26061
Oregon	September 26, 1973	39 *Fed. Reg.* 26061
Connecticut	September 26, 1973	39 *Fed. Reg.* 26061
Michigan	October 17, 1973	39 *Fed. Reg.* 26061
Washington	November 14, 1973	39 *Fed. Reg.* 26061
Wisconsin	February 4, 1974	39 *Fed. Reg.* 26061
Ohio	March 11, 1974	39 *Fed. Reg.* 26061
Vermont	March 11, 1974	39 *Fed. Reg.* 26061

remaining States, where there is no approved State permit program, EPA administers a permit program of its own. (§ 402(a)(1), 33 U.S.C. § 1342(a)(1).)

The permit system for existing plants and for new sources relies on the same general procedures issued by the Administrator acting under Section 402. *Cf. Environmental Protection Agency* v. *California, supra*, 44 U.S.L.W. at 4787 n.37. The permit system in practice operates somewhat differently, however, depending upon whether an existing or a new source is involved.

2. *"New source" permits.*

For new plants the administrative permit proceedings focus on EPA's "standards of performance" for new sources issued under Section 306, 33 U.S.C. § 1316.[10] These standards are applied in conjunction with an evaluation of the projected plant

STATE	DATE OF APPROVAL	FEDERAL REGISTER NOTICE OF APPROVAL
Delaware	April 1, 1974	39 *Fed. Reg.* 26061
Mississippi	May 1, 1974	39 *Fed. Reg.* 26061
Montana	June 10, 1974	39 *Fed. Reg.* 26061
Nebraska	June 12, 1974	39 *Fed. Reg.* 26061
Georgia	June 28, 1974	39 *Fed. Reg.* 26061
Kansas	June 28, 1974	39 *Fed. Reg.* 26061
Minnesota	June 30, 1974	39 *Fed. Reg.* 26061
Maryland	September 5, 1974	39 *Fed. Reg.* 34601
Missouri	October 31, 1974	39 *Fed. Reg.* 40067
Hawaii	November 29, 1974	39 *Fed. Reg.* 43759
Indiana	January 2, 1975	40 *Fed. Reg.* 4033
Wyoming	January 31, 1975	40 *Fed. Reg.* 13026
Colorado	March 28, 1975	40 *Fed. Reg.* 16713
Virginia	April 1, 1975	40 *Fed. Reg.* 20129
South Carolina	June 11, 1975	40 *Fed. Reg.* 28130
North Dakota	June 14, 1975	40 *Fed. Reg.* 28663
Nevada	September 20, 1975	40 *Fed. Reg.* 48389
North Carolina	October 20, 1975	40 *Fed. Reg.* 51493
New York	October 29, 1975	40 *Fed. Reg.* 54462

[10] If such standards are not in existence or have not been proposed, then a new plant is not a "new source" subject to the special requirements of Section 306. See § 306(a)(2). Any new plant which is not a "new source" would be regulated under the provisions for existing sources ("point sources"). See §§ 301(a) and (b), 304(b), 402(a), and 502(12) and (14).

made in an environmental assessment, or alternatively, an environmental impact statement. EPA's action in issuing a permit for any discharge from a new source is arguably subject to the provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, ("NEPA") including Section 102(2)(C) of NEPA respecting the preparation of environmental impact statements in certain cases.[11] To provide time to fulfil the Section 306 and the NEPA requirements for a new source permit, EPA has by notice in the *Federal Register* stated that potential permit applicants for a new source discharge should submit a request to the Agency for a "preapplication conference", and that such a request be filed at least 24 months prior to initiation of the discharge. (39 *Fed. Reg.* 35202 (Sept. 30, 1974).)

Substantively, the Section 306 standards are to require application of the "best available demonstrated control technology." (§ 306(a)(1), 33 U.S.C. § 1316(a)(1).) For 27 statutorily specified industrial categories, EPA was to propose new source standards within one year and ninety days after enactment of the 1972 Amendments. (§ 306(b)(1)(A), (B).) "[I]norganic chemicals manufacturing" was one of the 27 specified categories. (§ 306(b)(1)(A).) Final standards were to be promulgated 120 days later. (§ 306(b)(1)(B).) In issuing the standards, the Act provides that "[t]he Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous)." (§ 306(b)(2).)

Several enforcement routes are provided. Taken together, Sections 306(e), 309 and 505 provide that it is unlawful for a

[11] Section 511(c)(1), 33 U.S.C. § 1371(c)(1), provides that *none* of the actions taken by the Administrator pursuant to the Federal Water Pollution Control Act "shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA]", with two exceptions. One of those exceptions is "the issuance of a permit under Section 402 of this Act for the discharge of any pollutant by a new source as defined in Section 306 of this Act . . . ." § 511(c)(1), 33 U.S.C. § 1371(c)(1).

Permits issued for a new source by a State are not subject to NEPA's requirements. See the companion opening brief in Nos. 75-1473 and 75-1705, at 9 n.9.

new source to be operated in violation of a new source standard,[12] and that such a violation is subject to enforcement action by EPA as well as to citizen suits.[13] However, Section 402(k), 33 U.S.C. § 1342(k), provides that compliance with a permit "shall be deemed compliance, for purposes of Sections 309 and 505, with sections . . . 306 . . . [etc.]." Thus, a permit issued for a new source by a State or by EPA under Section 402 can contain "effluent limitations" which implement Section 306 but which are different from and which override the requirements of a new source standard issued under Section 306. In effect, the Act provides that in the absence of a permit the new source standard is applicable directly. But it also provides that permit proceedings can generate limitations different from an otherwise applicable new source standard, where a factual predicate for such limitations is established in the permit proceedings including the NEPA review process.

3. *Existing source permits.*

For existing plants, the permit process is more complex. Here, the Act does not specify the issuance of effluent standards. Rather, the basic regulatory framework in which the permit system operates is provided by regulations setting out the technology-based guidelines for effluent limitations under Section 304(b) of the Act, 33 U.S.C. § 1314(b). And, these guideline regulations are to reflect a two-phase implementation of treatment technology.

The purpose of these guideline regulations is provided by Section 301, 33 U.S.C. § 1311. Subsection (b) of Section 301 has two important attributes. It sets out in technological terms

[12] Section 306(e) provides:

"After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source."

[13] Section 309 authorizes EPA to take certain enforcement actions. Section 505 authorizes citizen suits.

the objective to be "achieved" by existing plants on a stringent time schedule:

> (1) By July 1, 1977, effluent limitations shall be achieved which require application of the "best practicable control technology currently available".
>
> (2) By July 1, 1983, and thereafter, the level to be attained is "best available technology economically achievable" (including elimination of discharges when it becomes "technologically and economically achievable").

In addition, Section 301 provides that these technological objectives shall be defined and determined in accordance with regulations under Section 304(b). (§ 301(b)(1)(A) and (b)(2)(A).)[14]

The regulations under Section 304(b), therefore, become the key to the achievement of both the 1977 and the 1983 objectives. Section 304(b) requires issuance by regulation of "*guidelines* for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402."[15]

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[14] The statute uses the term "defined" in Section 301(b)(1)(A) in providing for achievement of the 1977 objectives, and the term "determined" in Section 301(b)(2)(A) in providing for achievement of the 1983 objectives.

[15] S. Rep. 92-414, 92d Cong., 1st Sess., at 51 (1971), reproduced in Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1469 (1973) (hereafter "Leg. Hist.") (emphasis added). This regulatory pattern in the statute is confirmed by the legislative history of the Act. See *infra*, at 43-63. For example, the Senate Report quoted above stated:

> "*Subsection (b) of this section [Section 304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402.* These guidelines would identify what constituted the 'best practicable control technology currently available' and the 'best available control measures and practices', and the degree of effluent reduction attainable through the application of each. Thus, these guidelines would define the effluent limitations required by the first and second phases of the program established under section 301. In addition, the Administrator would identify control measures and practices available to eliminate the discharge of pollutants from any category of point sources, to allow the full implementation of the objectives of the Act." (*Id.* (emphasis added).)

Congress spelled out this portion of the statutory plan. It incorporated a direct command in Section 304(b) that the Administrator "shall" within one year promulgate regulations "providing guidelines for effluent limitations . . . ." (§ 304(b).) The statutory role assigned to guideline regulations under Section 304(b) is further demonstrated by Congress' specific requirement that they have two essential elements. *First*, the regulations "shall" identify the degree of effluent reduction attainable by 1977 through the application of "best practicable control technology currently available" for classes and categories of point sources. (§ 304(b)(1)(A).) *Second*, the statute directs that the regulations "shall . . . specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes." (§ 304(b)(1)(B).)[16]

Congress accorded this crucial role to guidelines issued under Section 304(b) to create a regulatory mechanism to cope with the plants already in place and operating. Congress recognized the large number of existing industrial plants which are sources of water pollution; it provided a means whereby the enormous diversity of these plants and their products and processes would have to be taken into account in the permit program.[17]

To this end, Congress explicitly set out in Section 304(b) the factors which EPA was to specify and elaborate with further

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[16] The comparable provisions pertaining to the 1983 guideline regulations are contained in Section 304(b)(2)(A) and (B).

[17] EPA's statement in the introduction to the regulations (speaking of the 1977 guidelines) describes the interrelationship between the uniform technological objectives set out in Section 301 and the guideline regulations under Section 304(b) as follows:

> "Section 304(b)(1)(B) of the Act provides for 'guidelines' to implement the uniform national standards of section 301(b)(1)(A). Thus Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology." (Appendix B, *infra*, at 17b.)

In contrast, for new plants Congress directed the Administrator to issue "Federal *standards* of performance for new sources" within the industry categories, and not guidelines. (§ 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (emphasis added).) The standards would apply absent special circumstances. See the companion opening brief in Nos. 75-1473 and 75-1705, at 5-11.

precision in the regulations.[18] Thus, the statutory provisions mandating the content of the Section 304(b) regulations make it plain that the guidelines are not merely to identify the degree of pollution reduction attainable with the "best practicable" (1977) and "best available" (1983) technology. The guidelines are also to provide the permit issuing authorities with EPA's elucidation, and elaboration in the context of the industry category involved, of the factors to be taken into account in actually applying the guidelines to a particular plant. Thus formulated, the guidelines will perform their intended function in a permit proceeding.

To assure that the guideline regulations were available promptly to permit-issuing authorities and to affected parties, Congress explicitly mandated that they be "publish[ed] within one year of enactment" of the 1972 Amendments. (§ 304(b).) Congress thus provided that the guideline regulations had to be issued roughly 7 months before the new source standards for the same industry had to be issued. (Compare § 304(b) with § 306(b)(1)(A) and (B). See *supra*, at 8, 11.)

4. *Administrative and judicial review of permits and regulations.*

The guideline regulations have a role beyond the initial permit proceedings for a particular plant. Where States and not EPA have the permit-issuing authority, the Act provides that

[18] For example, for the 1977 guideline regulations, Congress mandated that the Administrator's regulations "shall" specify and elaborate the following factors:

> "*Factors* relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act *shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved* from such application, and shall also take into account *the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, nonwater quality environmental impact* (including energy requirements), and such other factors as the Administrator deems appropriate . . . ." (§ 304(b)(1)(B) (emphasis added).)

The comparable identification of factors to be specified for the 1983 guideline regulations is in Section 304(b)(2)(B).

the State shall transmit to the Administrator for his review any permit which it proposes to issue. (§ 402(d)(1), 33 U.S.C. § 1342(d)(1).) The Administrator can block issuance of the permit by the State if within 90 days he "objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act." (§ 402(d)(2), 33 U.S.C. § 1342(d)(2).)[19]

Section 509 of the Act, 33 U.S.C. § 1369, provides for a method of judicial review of specified actions of EPA which is different from the normal review procedure in district courts under the Administrative Procedure Act. Section 509 provides that a special review by petition in the courts of appeals shall apply to an expressly specified group of actions by the Administrator, *i.e.*, certain actions under Sections 301, 302, 306 and 307, as well as certain actions taken respecting permits under Section 402. Regulations under Section 304(b) are *not* mentioned in Section 509. Issuance of new source standards under Section 306 is identified in Section 509.

B. Administrative Proceedings

1. *The initial "guidance" documents—a model for guideline regulations.*

The 1972 Amendments became law on October 18, 1972. EPA was faced with the immediate task of issuing guideline regulations within one year and of issuing new source standards within one year and 210 days. Since these regulations covered a full range of industrial, agricultural, and municipal treatment systems, and other facilities, the EPA's responsibility was enormous. Congress had mandated the time schedule for promulgating guideline regulations, however, with the knowledge that EPA already had commissioned various industry studies by a

[19] Since a new source standard is a "requirement" of the Act (see *supra*, at 7-9), the Administrator can also block issuance of a permit for a new source if he finds that the effluent limitations in the permit do not accord with an applicable new source standard.

number of outside contractors.[20] The Agency had plans to use these industry studies as the basis for "guidance" documents to be used with the Refuse Act Permit Program.[21]

The private contractor retained by EPA to prepare a technical report on the inorganic chemicals industry was General Technologies Corp. ("General Technologies"). General Technologies submitted its report in mid-July 1971. (R. 3183-3325.) By October 30, 1972, EPA had prepared a document it called "Effluent Limitations Guidance For The Refuse Act Permit Program, Inorganic Chemicals Industry." (App. 8-20, R. 2550-2567.) EPA said this "guidance" document set out the effluent discharge values obtainable after application of "best practicable control technology currently available" (App. 8, R. 2551), *i.e.*, it reflected the "1977 step" to be achieved by existing plants, as provided in the bills then pending before Congress to amend the Act. The values in the guidance document were set forth in terms of a range. "Schedule B" to the document represented "the most lenient acceptable effluent levels" and was intended as a base level since "[n]o plant should achieve less pollution reduction than Schedule B values." (App. 9, R. 2552.) A more stringent "Schedule A" was intended for plants beginning abatement programs. (App. 8, R. 2551.) Specific "Effluent Guide-

[20] The study of industrial wastewater technology began in 1971. EPA called this study the "Industrial Waste Studies Program." (See EPA's February 4, 1972, Summary Report on the Inorganic Chemicals Industry, R. 2708.) During the hearings on the bill which ultimately became the 1972 Amendments to the Act, EPA described the program as encompassing "program studies" of each of 20 separate industrial categories, including inorganic chemicals. See *infra*, at 15 n. 23, and 44-49. (R. 2708 refers to 21 such studies.)

[21] The Refuse Act Permit Program was premised on Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407, and had been established pursuant to a Presidential Executive Order. (See Executive Order 11574, 35 *Fed. Reg.* 19627 (Dec. 25, 1970).) It was implemented by the Corps of Engineers, acting in conjunction with EPA. (*Id.*) That program provided the impetus for, and was superseded by, the new permit program authorized by Section 402 of the Act. See *Environmental Protection Agency* v. *California*, ___U.S.___, 44 U.S.L.W. 4781, 4782 n.14 (U.S., June 7, 1976); *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 657 n.2, 659 n.9 (1973).

lines" for manufacture of 10 chemical products were set out. (App. 19-20, R. 2566-2567.)[22]

The EPA guidance documents were not formally published by the Agency as rules, but the guidance documents were available to EPA's regional offices, to the petitioner companies, and to others.[23] The companies submitted comments to EPA on the guidance documents during the period of June 1972 through November 1972. (R. 2719, 2716, 2589, 2601, 2618, 2627.) On November 16, 1972, a meeting was held of company representatives and of officials from EPA's Office of Refuse Act Permit Program. (R. 2639.) In part, the meeting focussed on the enactment of the 1972 Amendments (October 18, 1972), and the circumstance that the guidance documents would now have to be formally promulgated as regulations. (R. 2640-2641.)

2. *EPA decides to combine rulemaking for guidelines and new source standards.*

On August 6, 1973, approximately ten months after enactment of the 1972 Amendments, EPA published in the *Federal Register* a notice setting out, among other things, its procedures for adopting guideline regulations under Section 304(b) and new source standards under Section 306:

> "Advance notice is hereby given concerning notices of proposed rule making to be published by the Environmental Protection Agency ('EPA') with respect to effluent limitations guidelines, standards of performance, and pretreatment standards for new sources pursuant to sections 304(b), 306 and 307(c) of the Federal Water Pollution Control Act, as amended (33 U.S.C. §§ 1251, 1314, 1316 and 1317(c); 86 Stat. 816 et seq.; Pub. L. 92-500)

[22] The guidance document did not set out the factors which were to be applied by the permit officers in selecting the appropriate limitations in a permit. Rather, it contemplated that a technical briefing would be given by EPA for that purpose. (App. 8-9, R. 2551.)

[23] EPA announced that effluent guides for 20 industry categories would be distributed to EPA regional offices in October 1971 and would be made available to the public in November 1971. See BNA, *Environment Reporter*, Current Developments, at 570 (September 17, 1971).

('the Act'). *The purpose of this notice is to facilitate public comment upon the regulations to be promulgated under sections 304(b), 306 and 307(c), both before and after the publication of the notices of proposed rule making.* In addition, this notice will explain EPA's overall plans for development of effluent limitations guidelines and standards of performance for new sources and the approach which is being taken by the Agency in discharging the duties placed upon the Administrator under sections 304 (b), 306 and 307(c) of the Act.

"EPA believes that the exposure of the technical basis and reasoning underlying regulations to be established pursuant to sections 304(b), 306 and 307(c) is essential to the promulgation of sound effluent limitations guidelines and standards of performance for new sources." (38 *Fed. Reg.* 21202 (August 6, 1973), App. 21, R. 4330 (emphasis added).)[24]

Also in the August 1973 notice, EPA announced that it had initiated new technical studies by independent contractors "of some thirty [separate] point source [industrial] categories for which regulations will initially be promulgated . . . ." (38 *Fed. Reg.* at 21203, App. 25, R. 4331.) Among the industrial categories was "[No.] 15. Inorganic Chemicals Manufacturing." (*Id.*, App. 27.) EPA said it would make the contractor's technical reports available for review by interested persons, prior to the time it actually proposed any regulations for an industry. (*Id.* at 21205-21206, App. 37-38, R. 4333-4334.)

EPA's contractor for the inorganic chemicals industry regulations was again General Technologies. (R. 6378-6430.) In June 1973, two months prior to the August 1973 notice, General Technologies' "Draft Contractor's Report" (App. 1-7, R. 1-451) had been made publicly available by EPA. That report set out technical wastewater and treatment information

[24] As noted *supra*, at 4 n.5, Section 307 provides for pretreatment standards for existing sources (subsection 307(b)), and for new sources (subsection 307(c)). The pretreatment standards issued for new sources by EPA under Section 307(c) are not involved in these cases. EPA has not yet issued pretreatment standards for existing sources for the inorganic chemicals industry.

for 22 separate products in the industry. In a preambular statement to the report, the Agency stated that "[t]he regulations to be published by EPA under Sections 304(b) and 306 of the Federal Water Pollution Control Act, as amended, will be based to a large extent on the report and the comments received on it." (App. 2, R. 2.)

The June 1973 contractor's report and the August 1973 *Federal Register* notice of rulemaking procedures put the petitioner companies on notice that EPA intended to rely on a combined rulemaking proceeding to set both guideline regulations under Section 304(b) and new source standards under Section 306. EPA took this decision despite the fact that the Agency had in hand in late 1972 "guidance" documents which could have provided the basis for rapid promulgation of 1977-step guideline regulations under Section 304(b). By thus combining the rulemaking, the Agency effectively negated the one-year promulgation deadline set out in Section 304(b) for the existing-plant guidelines.[25] Also, in the combined rulemaking, EPA's work respecting existing plants reached beyond the 1977-step guidelines, which were needed by permit authorities to establish the first round of permits, to include also the 1983-step guidelines.

The next step to carry out EPA's combined rulemaking scheme for the inorganic chemicals industry occurred in August 1973, when EPA made available an "Economic Analysis Of Proposed Effluent Guidelines—Inorganic Chem-

[25] When EPA did not promulgate effluent guideline regulations by October 18, 1973, the deadline specified in Section 304(b), the Natural Resources Defense Council, Inc. filed a complaint against the Administrator in the U.S. District Court for the District of Columbia, seeking a court-ordered schedule for issuance of such guideline regulations. On November 27, 1973, the district court entered an order finding that EPA had a "mandatory, non-discretionary duty to publish within one year of enactment of the Act final Section 304(b)(1)(A) effluent limitation guidelines . . . ." *Natural Resources Defense Council, Inc.* v. *Train*, 6 E.R.C. 1033 (D.D.C. 1973), *rev'd in part on other grounds and remanded*, 166 U.S. App. D.C. 312, 510 F.2d 692 (1975). The district court imposed a detailed "schedule" for promulgation of final guideline regulations (*id.* at 1034-1036), a schedule which has since been modified on a number of different occasions by the court. As of July 1, 1976, EPA had not yet issued guideline regulations for a number of industry subcategories.

icals, Alkali And Chlorine Industries (Major Products)". (App. 43-47, R. 4334-4454.) This report also was prepared under the Agency's supervision by an independent contractor. EPA's preface to the report said that the purpose of the economic study was

> "to analyze the economic impact which could result from the application of alternative effluent limitation guidelines and standards of performance to be established under sections 304(b) and 306 of the Federal Water Pollution Control Act, as amended." (App. 44, R. 4338.)

Interested parties, including the petitioning companies, submitted comments to the Agency on the economic report and on the General Technologies study. (*E.g.*, R. 4034-4328.) And by August 1973, EPA had reviewed and revised the General Technologies technical report and had issued its "Development Document for *Proposed Effluent Limitations Guidelines* and New Source Performance Standards for the Major Inorganic Products Segment of the Inorganic Chemicals Manufacturing Point Source Category". (App. 48, R. 4455 (emphasis added).) Then, on October 11, 1973, EPA published a notice of proposed rulemaking for "effluent limitations guidelines and standards of performance" applicable to the 22 separate product subcategories in the inorganic chemicals industry which had been the subject of the prior reports. (38 *Fed. Reg.* 28173-28194, App. 60-151, R. 4861-4882.) In the preamble to the proposed regulations the Agency stated that it relied upon the reports of General Technologies and of its economic contractor, the comments made on those reports by interested parties, and its own assessment of technical treatment information. (38 *Fed. Reg.* at 28175, App. 66, R. 4863.) For existing plants EPA said that "[t]he regulations proposed herein set forth effluent limitations guidelines, *pursuant to section 304(b) of the Act*, for [the 22 individual product subcategories], of the inorganic chemicals manufacturing category." (38 *Fed. Reg.* at 28174, App. 62, R. 4862 (emphasis added).) [26]

[26] The Notice also stated that the "regulations proposed herein set forth the standards of performance applicable to new sources for [the 22 product subcategories] of the inorganic chemicals manufacturing industry." (38 *Fed. Reg.* at 28174, App. 63-64, R. 4862.)

In response to EPA's invitation, comments were submitted on the Agency's proposed guideline regulations for existing plants and proposed standards of performance for new sources. (App. 151-180, R. 4883-5353.)

3. *EPA announces a change in the legal basis for the existing-plant guideline regulations.*

In addition to the comments, in November 1973 an industry-association representative submitted a statement directly to the Administrator on the question whether the proposed guideline regulations met the requirements of Section 304(b). (App. 188, R. 6495.) As proposed, the guideline regulations did not contain ranges of effluent values, nor did they specify and elaborate factors as mandated by Section 304(b) to guide application of the numerical values to existing plants. In fact, the proposed guideline regulations did not look much different from the proposed new source standards. The statement remonstrated EPA for proposing regulations which took on the appearance of standards or fixed requirements, a characteristic which would cause difficulties in permit proceedings where the regulations would be applied to individual plants. (App. 189-190, R. 6496-6497.)

The response by Alan G. Kirk, II, then Assistant Administrator for Enforcement and General Counsel (App. 192-198, R. 6500-6504), demonstrated that the industry's concerns were legitimate. He said EPA's goal was to establish "nationally uniform standards" for existing plants as well as for new sources (App. 193, R. 6501), primarily because State permit and enforcement procedures would otherwise be too "lax" in some instances. (*Id.*) As then-Assistant Administrator Kirk put it: "For this reason, the guidelines must establish nationally uniform limitations to be implemented by the permit system rather than allowing individual determinations at the time of each permit application." (*Id.*, App. 194.)

Shortly thereafter, EPA issued general definitional regulations applicable to all the industry-category guidelines and

standards. (40 C.F.R. Part 401, *added by* 39 *Fed. Reg.* 4531-4533 (February 4, 1974), Appendix C to this brief, at 1c–9c.) Those general regulations contained a definition of "effluent limitations guidelines", a term not used in the Act:

> "(j) The term 'effluent limitations guidelines' means any effluent limitations guidelines issued by the Administrator *pursuant to section 304(b) of the Act.*" (40 C.F.R. § 401.11(j), Appendix C *infra*, at 5c (emphasis added).)[27]

At the end of February 1974, the Agency still had not finished its evaluation of the comments and issued its final regulations for the inorganic chemicals industry. However, EPA was moving even further from the statutory concept of issuing guidelines for existing plants under Section 304(b). In late February 1974 EPA gave notice that it was changing the asserted legal basis of the regulations for existing plants. On February 25, 1974, Alan G. Kirk, II, then Assistant Administrator for Enforcement and General Counsel, wrote in a widely publicized memorandum that "the effluent limitations guidelines which the Agency is presently issuing under Section 304(b) are also being issued [under] Section 301 and establish effluent limitations under Section 301." (Memorandum from Alan G. Kirk, II, to Acting Assistant Administrator for Air and Water Programs, at 2, February 25, 1974, reproduced in BNA *Environment Reporter*, Current Developments, at 1833-1834 (March 1, 1974).)

Assistant Administrator Kirk's Memorandum also contained a warning, *i.e.*, the Agency's new reliance on Section 301 as an authority for its regulations applicable to existing plants

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[27] The general provisions also defined "effluent limitation":

> "(i) The term 'effluent limitation' means any restriction established by the Administrator on quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources, other than new sources, into navigable waters, the waters of the contiguous zone or the ocean." (40 C.F.R. § 401.11 (i), Appendix C *infra*, at 5c.)

The Act also defines "effluent limitation", but in somewhat different terms. (See Section 502(11), 33 U.S.C. § 1362(11), *supra*, at 6 n.7.) The statutory definition covers restrictions "established by *a State or* the Administrator" (emphasis added), and also ends with the admonition that the term "includ[es] schedules of compliance." (*Id.* (emphasis added).)

had consequences for the jurisdiction and timing of any judicial action brought to obtain review:

> "[T]hese guidelines fall within the provision in Section 509(b) for judicial review within 90 days of 'any effluent or other limitation under Section 301'. The effluent limitations guidelines promulgated by the Agency will implement both Section 301 and Section 304. Since it would be impossible to challenge the Section 301 limitations without challenging the Section 304(b) guidelines, the requirements in Section 509(b) that limitations promulgated pursuant to Section 301 be challenged in the United States Court of Appeals and within 90 days almost must be considered to include challenges to Section 304 guidelines." (*Id.* at 2.)

4. *EPA issues final regulations in the combined rulemaking.*

Shortly thereafter, on March 12, 1974, the Agency issued its final regulations for the 22 product subcategories of the inorganic chemicals industry. (39 *Fed. Reg.* 9611-9635; Appendix B to this brief.) Notably, EPA still called its regulations for existing plants "[e]ffluent limitations guidelines". (See, *e.g.*, 40 C.F.R. § 415.192, *added by* 39 *Fed. Reg.* 9632 (March 12, 1974), Appendix B *infra*, at 65b.) And although EPA mentioned Section 301 along with Section 304 in the preamble of the rulemaking order,[28] concurrently it asserted that "[t]he legal basis" for the regulations was that set forth in the August 1973 general notice of procedures (see *supra*, at 15-16), which of course had referred only to guideline regulations under Section 304. (39 *Fed. Reg.* at 9612, Appendix B *infra*, at 2b.)

The final "guideline" regulations for both the 1977 step and the 1983 step and the new source standards look very much alike. In particular, the guideline regulations do not specify factors nor do they contain ranges of effluent values. The 1977-step guidelines are slightly different from the other regulations

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[28] The Agency said: "This final rulemaking is promulgated pursuant to sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act, as amended . . . ." (39 *Fed. Reg.* at 9612; Appendix B *infra*, at 2b.)

in one respect. For the 1977-step, EPA included a "modification" clause. (See, *e.g.*, 40 C.F.R. § 415.192 (first paragraph) (sodium silicate), Appendix B *infra*, at 65b–66b.) Under the clause, a permit authority may set in a permit for an individual plant limitations which are different from the regulation, if he finds that the plant's factors are "fundamentally different" from the factors "considered in the establishment of the giudelines" (presumably as specified in EPA's Development Document), and if after review in Washington the Administrator himself approves the finding and the new limitations. (*Id.*)

In sum, as a result of combined rulemaking proceedings, EPA issued final 1977-step and 1983-step guideline regulations which look very much like the new source standards promulgated at the same time. For each such regulation or standard in each product subcategory, EPA set single-number pollutant values, not ranges, and EPA nowhere specified any factors to be used in applying the numerical values to individual plants. A very limited "escape valve" was provided with the 1977-step guideline regulations. In the course of developing the regulations, the Agency had shifted its focus from the congressionally contemplated 1977-step "guidance" documents, both as to the nature of its regulations and as to their legal basis and effect.

C. Judicial Proceedings And Decisions Below

On April 1, 1973, the petitioning companies filed a complaint in the U.S. District Court for the Western District of Virginia (App. 204), seeking review of EPA's guideline regulations applicable to existing plants in the sulfuric acid production subcategory of the inorganic chemicals industry. (40 C.F.R. §§ 415.210-.213, Appendix B *infra*, at 68b–70b.) The companies asserted that the district court had jurisdiction of such a review action based upon the provisions of 28 U.S.C. §§ 1331, 1332, 1337, 1361 and 1651, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and Section 10 of the Administrative Procedure Act, now codified as 5 U.S.C. §§ 701-706. Contemporaneously fifteen companies, including the eight companies involved in the District Court action, filed timely

"protective" petitions for review of the EPA inorganic-chemical guideline regulations in the U.S. Court of Appeals for the Fourth Circuit. *E.g.*, *E. I. du Pont de Nemours & Co.* v. *Train*, No. 74-1261 (4th Cir.) (App. 199).[29] Separate petitions for review were also filed respecting EPA's new source standards for the industry, issued under Section 306(b) of the Act. *E.g.*, *FMC Corp.* v. *Train*, No. 74-1296 (4th Cir.) (App. 202).

In the district court the companies promptly filed a motion seeking partial summary judgment on the issues of that court's jurisdiction and of EPA's power and obligations under the Act to issue regulations for existing plants. EPA filed a motion to dismiss the district court action based upon an asserted lack of subject matter jurisdiction.

After a hearing on the cross-motions, on September 27, 1974, the district court issued an opinion and order dismissing the complaint. *E. I. du Pont de Nemours & Co.* v. *Train*, 383 F. Supp. 1244 (W.D.Va. 1974) (App. 219). The district court adopted EPA's contentions that Section 509(b) of the Act, 33 U.S.C. § 1369(b), provided for exclusive jurisdiction of any review action in the courts of appeals. This conclusion by the court was based upon the court's acceptance of EPA's argument that the Agency had an implied power to issue effluent limitations by regulation for existing plants under Section 301 of the Act, 33 U.S.C. § 1311, and upon the reference in Section 509(b)(1)(E) to effluent limitations under Section 301. The companies had argued that for such existing plants EPA was explicitly mandated by express language in Section 304(b) of the Act, 33 U.S.C. § 1314(b), to issue guideline regulations. The companies contended that review of such guideline regulations did not fall within Section 509(b)'s special provisions for review in the courts of appeals of certain specified EPA actions. EPA had argued that the ostensible mandate of Section 304(b) for guideline regulations should be disregarded; instead, Sec-

[29] As noted, EPA took the position that review was in the court of appeals under Section 509(b)(1)(E). Where Section 509(b) governs review, paragraph 509(b)(1) requires the filing of a petition for review "within ninety days . . . ."

tion 304(b) should be construed as merely providing a "definitional" basis for establishing effluent limitations by regulation under Section 301.[30]

An expedited appeal of the district court's decision was taken to the Fourth Circuit. That appeal was consolidated for briefing and argument with the protective petitions for review.[31] The companies maintained their claim that the Agency had not followed the Act in issuing its regulations for existing plants, and they correspondingly contested the jurisdiction of the court of appeals. The companies also challenged the Agency's "guideline" regulations and new source standards for eleven of the 22 product subcategories on the ground that the regulations were not supported by the administrative record.[32]

The court of appeals issued two decisions in the consolidated cases. In the first decision (*"du Pont I"*) the court dealt with the appeal. (528 F.2d 1136, App. 240.) It upheld its own jurisdiction to review EPA's action in issuing existing plant regulations and thus affirmed the district court's dismissal of the companies' complaint. The court of appeals separated the question of the Agency's authority from the issue of juris-

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[30] EPA argued in the district court that its limitation regulations were to be "mechanically cranked" into discharge permits required under the Act for particular plants, without any particular reference to a plant's individual circumstances or to the statutory factors set out in Section 304(b)(1)(B) and 304(b)(2)(B).

[31] The appeal and the protective petitions for review were ultimately consolidated for argument with the petitions seeking review of the standards for new sources. All the regulations challenged by the complaint and the petitions for review were promulgated in the same administrative proceeding upon the same record.

[32] In addition, the companies contested portions of EPA's definitional regulations, applicable generally to all the industry-category regulations. (See 40 C.F.R. § 401.11, Appendix C *infra*, at 4c-7c.) The companies had filed the protective petitions for review within 90 days both of the promulgation of the inorganic chemicals regulations and of the separate issuance of the definitional regulations. The protective petitions had sought review of EPA's action in issuing both sets of regulations. (See, *e.g.*, App. 200-201.) The companies were particularly concerned with EPA's definitions of "effluent limitations", "process waste water", and "process waste water pollutants." (40 C.F.R. § 401.11(i), (q), (r).)

diction. It ruled that promulgation by EPA of the mandated guideline regulations under Section 304(b) was a necessary step to attainment of the objectives for existing plants set out in Section 301. Consequently, action by EPA under Section 304(b) "should properly be considered to be pursuant to the provisions of [Section] 301 and, therefore, reviewable by this court under [Section] 509." (528 F.2d at 1142, App. 250.)

Then, on March 10, 1976, the court of appeals rendered its decision on the protective petitions for review. (*"du Pont II"*, App. 253.) The court sustained EPA's claim that it could issue effluent limitations by regulation under Section 301, but it ruled against the Agency on the role to be accorded those regulations. The court held that such existing-plant regulations were not binding on the permit-issuing authorities, but rather were only "presumptively applicable." (App. 262.) In administrative proceedings to establish a discharge permit for a particular plant, the permit applicant could adduce facts respecting the individual plant or facility to rebut the presumption of applicability. The court also ruled that EPA's new source standards were subject to a "rule of presumptive applicability", and it directed that EPA on remand "should come forward with some limited escape mechanism for new sources." (App. 263.)

The court then turned to the challenge to specific aspects of the regulations. It set aside the portions of EPA's definitional regulations of general applicability dealing with "process waste water", "process waste water pollutants", and "effluent limitations." (App. 262, 271.) Then the court focussed on the specific subcategory regulations. The companies had challenged all or part of the regulations for eleven different subcategories. In each instance, the court set aside those portions of the subcategory regulations which had been challenged, *i.e.*, all or part of the regulations for the production of chlorine, hydrochloric acid, hydrofluoric acid, hydrogen peroxide, nitric acid, sodium carbonate, sodium dichromate, sodium metal, sodium silicate, sulfuric acid, and titanium dioxide. (App. 272-286.)

ARGUMENT

Summary of Argument and Introduction to Argument

As the court of appeals said in *du Pont II*, the issue of the nature of EPA's regulations for existing plants "goes to the heart of the controversy." (App. 258.) For existing plants, Congress expressly and explicitly mandated in Section 304(b) that EPA issue "regulations, providing guidelines for effluent limitations . . . ." EPA well knew what Congress meant by calling for guideline regulations. At the time the 1972 Amendments were being enacted, Congress had before it an exemplar in the form of EPA's "guidance" documents prepared for use with the Refuse Act Permit Program.

The Agency's initial efforts to implement the Act were in fact directed toward the conversion of the Refuse Act Permit Program guidance documents into published guideline regulations. EPA gradually shifted course, however, and ultimately reached the point where the Agency no longer considered itself bound by Section 304's command. To establish a Washington-based control over permit-issuing authorities in the States and in its own regional offices, EPA at first asserted that its guidelines constituted and had the legal effect of "nationally uniform limitations." Then EPA moved still further away from the statute to its present position, *i.e.*, that its rules for existing plants could take the form of single-number effluent limitations issued under an authorization said to be implied from Section 301.

EPA's action in changing the nature of its existing-plant regulations, and in devising a chimerical, non-statutory legal basis for them, has provoked a series of delays in carrying out the Act's lofty promises. Section 304(b) commanded EPA to issue guideline regulations for existing plants within one year from enactment of the 1972 Amendments (October 18, 1972). EPA had issued no regulations by that deadline, and indeed now, nearly four years later, it still has not issued all of the regulations. Plant operators and permit-issuing authorities have

had difficulty resolving permits. EPA's insistence on prescribing permit terms from Washington has eliminated the benefit which Congress intended to secure by having permit-issuing authorities in States or in EPA regional offices make factual findings based upon the particular circumstances at individual plants. Congress had specifically required that EPA spell out factors in guideline regulations to promote reasoned fact-finding in permit proceedings for individual plants. As a consequence of EPA's shift in the content of and basis for its regulations, well over 200 actions have been brought in Federal courts seeking review of such regulations. As a result of these review actions, many of EPA's effluent regulations have been set aside. A number of such cases remain to be decided.

The statutory provisions themselves provide the touchstone for this Court's analysis of the functions and obligations of EPA respecting effluent regulations for existing plants. The courts of appeals for the Second, Third, Fourth, Seventh, Eighth, Tenth, and District of Columbia Circuits have struggled with these questions. Like the Fourth Circuit in these present cases, the courts of appeals were faced with reconciling on the one hand statutory provisions that explicitly provided for issuance of existing source guideline regulations which could be applied by permit authorities taking into account the wide range of situations found at the many and diverse plant sites—and on the other hand EPA's insistence that it could draw upon general provisions and inferences as authority to issue rigid single-number limitations. Given these circumstances, perhaps it is not surprising that the courts of appeals have adopted four different and conflicting views of EPA's functions in this regulatory area.

Questions of the jurisdiction of courts of appeals or of district courts to review EPA's effluent regulations for existing sources depend upon and should be analyzed after consideration of the basic issues of statutory construction.

The subsequent discussion of specific issues on the merits shows the following—

1. Section 304(b) of the Act specifically mandates that EPA issue its effluent limitations for existing plants as "guidelines for

effluent limitations", such that these guideline regulations may be used by permit authorities to establish limitations in permits for particular plants. There is no basis, express or implied, nor is there any place in the statutory scheme for EPA to promulgate limitations by regulations. EPA bases its contentions upon broad non-statutory grounds, arguing that unless it issues limitation regulations, State permit authorities will be too "lax" in applying guideline regulations. These grounds contravene policy decisions made by Congress, which structured the Act to provide for a meaningful exercise by States of permit-issuing power and, to that end, mandated guideline regulations such that either State or Federal permit authorities could deal with the great diversity in existing plants. Congress expressly required EPA to issue guideline regulations in the form of ranges of effluent pollutant values, along with a specification and elaboration of factors to guide permit-issuing authorities in selecting a particular pollutant value from the range for application to a given plant as a limitation in the plant's permit.

2. The legislative history of the 1972 Amendments to the Act supports the statutory language. The Senate Public Works Committee conducted extensive hearings and focussed on provisions to conform the Executive Branch's Refuse Act Permit Program, and the "guidance" documents being generated by EPA, to the Committee's technological wastewater treatment objectives. The Senate Committee structured a bill which contained a Section 304(b) mandating guideline regulations; the bill proclaimed the States to be primarily responsible for the control of pollution and provided in its Section 402 for issuance of permits by qualified States. That bill passed the Senate. In the House, subsequent hearings and debate occurred over the requirement in the Senate Bill that EPA approve State-developed permits before issuance, especially given the fact that EPA would issue guidelines and not standards for existing plants. The House-passed bill affirmed the States' primary responsibility and provided for EPA review of State-issued permits only in limited circumstances. Differences between the Senate- and House-passed versions were resolved in a Conference Committee Bill which retained the provisions in Section 304(b) for guideline regulations and did not authorize EPA to issue standards or limitations for existing plants. The final Bill confirmed the policy of State responsibility to administer the permit system while giving EPA authority to veto State-issued permits which are "outside the guidelines and requirements" of the Act.

3. The court of appeals tried to compromise the express statutory mandate with EPA's contrary assertions. By its compromise, the court ruled that EPA could lawfully issue single-number limitation regulations, but that these regulations were only presumptively applicable to individual plants. In permit proceedings a plant's particular circumstances could be assessed, along with the statutory factors specified in Section 304(b)(1)(B) and (b)(2)(B), to establish limitations different from those set out in the regulations. By contrast, the Eighth Circuit has required EPA to adhere to the system of guideline regulations and permits which is specified in the statutory language. Other courts of appeals have either reached a different compromise with the statute than that adopted by the Fourth Circuit in the instant cases or they have given no place whatsoever to guideline regulations. There is no basis in the statute for the several compromise decisions, or for those decisions which have entirely elided Section 304(b) from the Act.

4. EPA's present construction of the Act is not a contemporary one. It is not entitled to deference. EPA initially construed the statute as calling for guideline regulations. The Agency gradually shifted its views to accord with a developing policy of issuing regulations to be applied nationally without regard to individual circumstances. Nonetheless, the express mandate in Section 304(b) to issue guideline regulations is neither subsumed under nor overriden by any inferred regulatory power to do something different. EPA should be held to honor the requirements of Section 304(b).

5. Superimposition of limitation regulations on a statutory framework structured to accommodate guideline regulations would have an adverse effect upon a number of collateral provisions of the Act. A scientific advisory committee is charged by the Act with review of guideline regulations, and new source standards, among other things, but limitation regulations are not mentioned. The statutory provisions for periodic review

by EPA of its regulations are premised upon guidelines. Enforcement would be adversely affected; the Act is structured such that "effluent limitations" written as conditions of permits are enforceable, but the existing-plant effluent regulations themselves are not independently enforceable. Were these limitation regulations, premature judicial review actions would have to be brought under the jurisdictional provisions of the Act, and the jurisdictional provisions would be construed in such a fashion that there would be no Federal judicial review of EPA's action on State-issued permits, contrary to Congress' intent.

6. In *du Pont I*, the court of appeals was in error in concluding that it had jurisdiction over original proceedings to review guideline regulations pursuant to the terms of Section 509(b)(1) of the Act. Jurisdiction of actions to review EPA's issuance of guideline regulations properly rests with the district courts. However, this Court should apply the doctrine of pendent jurisdiction to permit, but not to require, a court of appeals to review guideline regulations where such review is an adjunct to an action properly brought under Section 509 (b)(1) for review of new source standards concurrently promulgated on the same administrative record.

I.

SECTION 304(b) OF THE ACT MANDATES THAT EPA ISSUE ITS EFFLUENT REGULATIONS FOR EXISTING PLANTS AS "GUIDELINES FOR EFFLUENT LIMITATIONS", SUCH THAT THESE GUIDELINE REGULATIONS MAY BE USED BY PERMIT AUTHORITIES TO ESTABLISH LIMITATIONS IN PERMITS FOR PARTICULAR PLANTS

The court of appeals struggled with the main question in this case and reached a compromise resolution which does not follow the statutory mandate. At issue here is the nature of EPA's statutory power to issue regulations governing the discharge of effluents from existing plants. As the court of appeals recognized, this issue has two distinct aspects. The grant of regulatory power to EPA by Congress prescribes the content of

EPA's regulations, and it determines also the legal effect of the regulations and the mode of implementation of the regulations in permit proceedings.

Both of these branches of the general question are important. Analytically they are closely intertwined. Congress structured the form and content of the regulations in light of their intended purpose and legal effect. And, because EPA has sought to shift the purpose and effect of the regulations from what Congress intended, the Agency also has had to restructure their content. The court of appeals was willing to sanction EPA's shift in the form and content of the regulations, but it rejected EPA's position on the purpose and effect of the regulations. The court should have held EPA to faithful adherence to the statute in both respects, not just one.

A. The Statutory Language Requires EPA To Issue "Guideline" Regulations Under Section 304(b), Not "Limitation" Regulations Under Section 301

1. *The statute expressly states the requirements for EPA's regulations.*

Section 301 sets out the statutory objectives and timetables for existing plants. The language of the Section requires that "effluent limitations" be "achieved" by existing plants, *not* that the limitations be promulgated in regulations:

> "(b) In order to carry out the objective of this Act *there shall be achieved*–
>
> > "(1)(A) not later than July 1, 1977, *effluent limitations for point sources*, other than publicly owned treatment works, (i) *which shall require the application of the best practicable control technology as defined by the Administrator pursuant to section 304 (b) of the Act* . . . ."
> >
> > (§ 301(b), 33 U.S.C. § 1311(b) (emphasis added), Appendix A *infra*, at 3a.)[33]

[33] The comparable provisions for the 1983 objective are set out in Section 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

Section 301 puts obligations on operators of plants and facilities making discharges, not on the Administrator. The Administrator's responsibilities are set out in Section 304(b):

> "(b) For the purpose of adopting or revising effluent limitations under this Act *the Administrator shall . . . publish* within one year of enactment of this title, *regulations, providing guidelines* for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. *Such regulations shall*—
>
> "(1)(A) *identify*, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, *the degree of effluent reduction attainable through the application of the best practicable control technology currently available* for classes and categories of point sources (other than publicly owned treatment works); *and*
>
> "(B) *specify factors to be taken into account in determining the control measures and practices to be applicable to point sources* (other than publicly owned treatment works) within such categories or classes. Factors relating to assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 301 of this Act shall include considerations of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate . . . ."
>
> (§ 304(b), 33 U.S.C. § 1314(b) (emphasis added), Appendix A *infra*, at 7a–8a.)[34]

[34] Paragraph 304(b)(1) pertains to the Administrator's duty to issue the 1977-step guideline regulations. The following paragraph (§ 304(b)(2)) contains the requirements for the 1983-step guideline regulations. The required content of the 1983-step regulations is quite similar to that for the 1977-step regulations; for brevity, the 1983-step provisions have not been quoted in the foregoing text.

In Section 304(b), then, Congress has instructed the Administrator (a) that he is to issue regulations providing guidelines, (b) within one year from enactment of the 1972 Amendments, and (c) which have a specific content, *i.e.*, numerical values identifying the degree of effluent reduction attainable with an identified level of technology, along with a specification and elaboration of factors to be used to apply the control measures and practices to particular plants ("point sources").

2. *EPA now refuses to follow the statute, relying on broad non-statutory grounds which contravene policy decisions made by Congress.*

Section 304(b) is sufficiently detailed and explicit in its express command to the Administrator that one might wonder why basic questions have arisen respecting the nature and effect of the Administrator's regulations. As the court of appeals put the matter in *du Pont II*:

> "Section 304(b) specifically authorizes the Administrator to publish 'regulations, providing guidelines for effluent limitations.' Nothing is said in § 301 about regulations." (App. 260.)

EPA nonetheless has argued that it draws from the Act an implied power to issue "effluent limitations" by regulation for existing plants. The Agency asserts "that the[se] regulations impose limitations which are applicable uniformly throughout the nation and, with some exceptions, must be mechanically cranked into each permit by the issuer." (App. 261.) The companies, by contrast, have consistently argued that EPA should follow the instructions Congress set out in Section 304(b). EPA should issue "guidelines" under Section 304(b) which contain both effluent values in numerical terms and a specification of factors to guide the use of the numbers by permit issuers. Congress called for such guideline regulations to enable permit-issuing authorities to cope with the diversity of existing facilities.

Faced with these disparate positions, the court of appeals ruled that EPA had implied power to issue "limitations" by

regulation under Section 301 (App. 260-261.)[35] The court decided, however, that these limitations had a legal effect much like "guidelines" under Section 304. The limitations were only "presumptively applicable", and in administrative proceedings to establish a permit for a particular plant, the permit applicant could adduce facts relating either to the special circumstances of the plant or to the statutory factors set out in Section 304(b)(1)(B) and Section 304(b)(2)(B) to rebut the presumption of applicability and to sustain different limitations. The court cited no statutory provisions in support of its conclusion that the permit issuer is to "apply" the factors. Rather, its decision seems to have been predicated upon an unwillingness to obliterate Section 304(b) completely. (See App. 266.)

The compromise decision of the court of appeals does not adhere faithfully to the terms of the Act and does not serve Congress' intent. In its decision the court in effect wrote out of the statute those portions of Section 304(b) which call for EPA's regulations to include a specification of factors to guide permit authorities and which call for EPA to identify the requisite pollutant reduction "in terms of *amounts* of constituents and . . . characteristics",[36] rather than in the one-number terms EPA used. While the court recognized the fault in EPA's rigid one-number contention, and tried to preserve some elements of Section 304(b) by its ruling that permit issuers should "apply" the factors, the court in fact practically elided Section 304(b) from the Act.

The best evidence of congressional intent in enacting Sections 301 and 304 as a major part of the 1972 Amendments is the language Congress used in the sections themselves. Section

[35] In the view of the court of appeals, "[t]he source of power to impose § 301 limitations by regulation can only come from § 501(a) which authorizes the Administrator 'to prescribe such regulations as are necessary to carry out his functions under this Act.'" (App. 260.)

[36] § 304(b)(1)(A), 33 U.S.C. § 1314(b)(1)(A) (emphasis added). The legislative history explains that EPA was to provide for a range of effluent values (see *infra*, at 65-67), such that the permit authorities could use the factors to chose the limitations for a particular plant from the range.

304(b) expressly and affirmatively commands EPA to issue a given type of regulation. In short, here EPA's powers and obligations have been set out by Congress in a "legislative affirmative description of those powers", which strongly implies that Congress denied to the Agency the powers to do something different. *Durousseau* v. *United States*, 6 Cranch [10 U.S.] 307, 314 (1810).[37] The matter is one of recognizing Congress' consistency of purpose, and not just one of applying a maxim of statutory construction:

> "The circumstances of this inquiry carry us beyond the rule of *expressio unius est exclusio alterious*, cf. *Ford* v. *United States*, 273 U.S. 593, 611, and into the domain of inconsistency of purpose. Cf. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436 *et seq.*"
>
> (*Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942).)

Cf. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457-458 (1974).

Neither EPA nor this Court have any warrant to depart from the express requirements of Section 304(b) simply because the Agency now desires to do something different. EPA has arrived at its present position by fitful administrative plunges over the past four years; each of its changes in direction moved it away from the statutorily prescribed guidelines until it finally reached Washington-set limitations to be "mechanically cranked" into all permits for existing plants. EPA seems to fear that State permit and enforcement procedures may be too "lax" in some instances. (App. 193, R. 6501; see *supra*, at 19.) This "reason", however, flies in the face of the decision by Congress to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,

[37] In *Durousseau* Chief Justice Marshall's opinion for the Court construed the terms of Article III, section 2, clause 2 of the Constitution and the implementing Judiciary Act, granting certain appellate jurisdiction to the Supreme Court, to except from the Court's appellate jurisdiction matters not affirmatively specified.

[and] to plan the development and use . . . of land and water resources . . . ." (§ 101(b), 33 U.S.C. § 1251(b).) Specifically, EPA is to issue guideline regulations under Section 304(b) which can be used and implemented by State permit authorities. This administrative framework cannot be overriden by EPA as a matter of its own fiat just because the EPA now apparently disagrees with Congress' decision that the Agency should share some power with States. See *Thomas Paper Stock Co.* v. *Porter*, 328 U.S. 50 (1946); *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942). The Agency's position rests on broad policy arguments, which contravene decisions by Congress, coupled with general references to the far-reaching aims of the legislation. These are not enough. Thirty years ago, in similar circumstances, Mr. Justice Frankfurter wrote for the Court:

> "Nor can we draw on broad arguments about inflationary pressures on price control in construing legislation dealing with so technically confining a provision as that of the Taft Amendment [to the Emergency Price Control Act] . . . . Of course, all provisions of the Emergency Price Control Act are infused by its far-reaching aims. But the accommodation of the various interests involved in a system of price control is for Congress and not for us, and we must construe its legislation as fairly as we can to catch the will behind the words."
>
> (*Thomas Paper Stock Co.* v. *Porter*, *supra*, 328 U.S. at 54-55.)

In its *du Pont II* decision, the court of appeals erred in trying to compromise between the commands of the statute and the statutorily unsupported assertions of EPA. The court of appeals should have looked first to the statute. If it would have approached its decision in that light, the court would have concluded that EPA was correct in its initial efforts to convert the "guidance" documents generated for use with the Refuse Act Permit Program into "guideline" regulations meeting the requirements of Section 304(b). See *supra*, at 15. EPA should have held to that course; if it had done so, the regulations before this Court would have had a quite different content.

3. ***The conflicting decisions by various courts of appeals and district courts have arisen because a number of the courts have failed to construe the statute as written.***

While a number of courts of appeals and district courts have considered the questions posed here, those courts who did look first to the statutory provisions themselves are in a minority. Not surprisingly, however, one such court has provided perhaps the best description of what EPA must do to adhere faithfully to Section 304(b):

> "As the Court interprets the language of section 304(b), the guideline regulations to be promulgated by the EPA are meant to set forth two basic standards for both the 1977 and the 1983 technologies. First, the guidelines are to 'identify . . . the degree of effluent reduction attainable through the application of the . . . technology . . . *for classes and categories of point sources* . . . .' Section 304(b)(1)(A). (Emphasis supplied.) The Congress has directed the EPA to determine for each class or category of point sources how much effluent reduction can be achieved through the application of the appropriate technology. Second, the guidelines should specify the factors which may be taken into account in determining, *for each individual point source*, the best measures to achieve the application of the relevant technology. Thus, the guideline regulations are to be two-pronged. They should state the effluent reduction possible for the entire class or category of point sources within a given range and they should also analyze those factors deemed important for the writing of an individual permit within that range."
>
> (*Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 104 (S.D. Iowa 1976) (Stuart, J.), *appeal pending* No. 76-1233 (8th Cir.) (emphasis by the Court).)

The district court's recognition of the requirements of Section 304 for guideline regulations in the *Grain Processing* case stems from and fleshes out the Eighth Circuit's earlier decision in *CPC International Inc.* v. *Train*, 515 F.2d 1032 (8th Cir. 1975). In its *CPC* decision, the Eighth Circuit had ruled that Section 304(b), not Section 301, governed EPA's rulemaking require-

ments for its existing-plant effluent regulations. EPA had relied upon a regulatory power said to be implied from Section 301, just as it did in these *du Pont* cases.[38] The Eighth Circuit concluded that the power EPA asserted had not been granted by Congress, impliedly or otherwise, and moreover that the type of "limitation" regulation urged on the court by EPA was inconsistent both with the express requirements for regulations in Section 304(b) and with the provisions of Section 402 dealing with permits. (515 F.2d at 1037, 1038.) The Eighth Circuit found no statutory basis for accepting jurisdiction of an action to review regulations issued by EPA under Section 304(b), and accordingly it dismissed the "protective" review petitions before it.[39] The *Grain Processing* case was then brought and proceeded to decision in district court.

Other courts have not treated the statutory language with such respect. Like the Fourth Circuit in the instant cases, the Third Circuit tried to meld together EPA's assertion of authority to issue limitations on the one hand and Section 304(b)'s express language on the other. It reached a different compromise, however. In *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027 (3rd Cir. 1975), the Third Circuit held that EPA could issue "limitation" regu-

[38] There, as in these cases, EPA had "contend[ed] that, in using the passive voice, 'there shall be *achieved* . . . effluent limitations,' Congress intended to require the EPA to promulgate effluent limitations by regulation under § 301(b)." (515 F.2d at 1037.)

[39] The Eighth Circuit observed that Section 509(b) of the Act, 33 U.S.C. § 1369(b), did not specify promulgation of Section 304(b) guideline regulations as being among the expressly listed group of actions which were to be reviewed in the courts of appeals. (515 F.2d at 1037.) The court took "note that counsel for the government stated at oral argument that, if it were held that the existing source regulations had been promulgated pursuant to § 304(b), they would be reviewable in District Court." (515 F.2d at 1038 n.12.)

The Eighth Circuit took jurisdiction to review the new source standards for the corn wet milling industry; the parties had agreed that jurisdiction to review those standards was in the courts of appeals under Section 509(b)(1)(A) ("standards of performance for new sources") and (C) ("pretreatment standard for new sources"). On the merits, the Eighth Circuit determined that both the standards of performance for new sources and the pretreatment standards for new sources were not supported by the administrative record, and the court remanded the standards to the Agency. (515 F.2d at 1043-1052.)

lations pursuant to authority implied from Section 301, that such regulations were to provide a treatment " 'base level', and concomitant pollutant ceiling" (526 F.2d at 1045), and that in conjunction with the limitations the Administrator had to issue guideline regulations providing a range of more stringent controls:

> "Having determined the 'base level', and the 'ceiling', he [the Administrator] must then promulgate guidelines which are to guide the permit-issuing authorities in deciding whether, and by how much, the limitation to be applied to any individual point source is *more* stringent than the base level (in terms of requiring more effective technology), and more stringent than the ceiling (in requiring a lower amount of effluent discharge). *Thus, we reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent control permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling.*" (526 F.2d at 1045) (emphasis by the Court and emphasis added).)

Like the regulations in these cases, the EPA regulations before the Third Circuit "establish[ed] only single number effluent limitations for each of twelve subcategories within the iron and steel industry." (526 F.2d at 1045.) The Third Circuit ruled such regulations invalid and remanded them to EPA because they did not specify factors and did not contain ranges of pollutant values, as required by Section 304(b):

> "[T]hey do not specify any factors to be taken into account in determining the control measures to be applied to individual point sources within the categories and classes, as required by sections 304(b)(1)(B) and 304(b)(2)(B). Furthermore, they do not specify permissible 'ranges' of limitations below the ceiling."
>
> (526 F.2d at 1045.)

Like the Fourth Circuit in these cases, the Third Circuit struggled to give some effect to Section 304(b)'s provisions, notwithstanding EPA's efforts to ignore the Section, out of a recognition that Congress had written Section 304(b) to provide regulations which could be applied rationally in the permit process to the diverse situations at existing plants. (526 F.2d at 1043-1044, 1046.) The Third Circuit found a number of parts of the statute and of the legislative history "hard to reconcile" and fraught with "ambiguity" and "inconsistency". (526 F.2d at 1043, 1052 & n.51; see also Judge Adams' concurring opinion, 526 F.2d at 1073, 1074.) It is not surprising that the court found the statute to be difficult. The court was trying to engraft a system of EPA "limitation" regulations upon a framework structured by Congress to accommodate guideline regulations.

Several courts of appeals abandoned any effort whatsoever to give effect to Section 304(b). In *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442 (7th Cir. 1975), the petitioners raised no claims based upon EPA's failure to comply with Section 304(b) (526 F.2d at 448 n.13),[40] but rather raised only technical issues dependent upon the administrative record. Consequently, the Seventh Circuit focussed on whether the EPA industry-category regulations before the court were valid as Section 301 "limitations". In *Hooker Chemicals & Plastics Corp.* v. *Train*, __F.2d__, 8 E.R.C. 1961 (2d Cir. 1976), the Second Circuit sanctioned EPA's promulgation of limitations by regulation under Section 301. While the court's rationale is not altogether clear, it seemingly took the view that Section 304(b)'s mandate to the Administrator to issue regulations is subsumed in and overriden by a regulatory power inferred from Section 301.[41] The Second Circuit said it ruled on the

[40] The Seventh Circuit allowed *amici curiae* to raise the jurisdictional issues discussed *infra* at 85-93, but no other questions. See 526 F.2d at 448 n.12. The entire participation of the *amici* in the *American Meat Institute* case came after briefing by the parties had been completed and after the court had heard oral argument.

[41] The court said:

> "Section 304 structures the procedure and identifies the criteria for consideration whereby the Administrator in the context of industrial categories of existing effluent dischargers gives concrete definitional content to effluent limitations mandated by § 301." (8 E.R.C. at 1966.)

matter reluctantly, against a "background of puzzling statutory language, ambiguous legislative history and conflicting court decisions . . . ." (8 E.R.C. at 1965.) Finally, the District of Columbia Circuit has adopted the position that EPA could issue limitations by regulation under Section 301, and as a permissible "shortcut", could dispense with guideline regulations. *American Frozen Food Institute* v. *Train*, __U.S. App. D.C. __, __F.2d __, 8 E.R.C. 1993, 2007 (1976) (opinion by Judge Edwards of the Sixth Circuit, sitting by designation). The District of Columbia Circuit ruled EPA initially had a duty to issue guideline regulations under Section 304(b), but that "thereafter as a subsequent 'phase'" the Administrator was to issue limitation regulations under Section 301(b). (*Id.*)[42]

This Court thus faces a spectrum of views presented by the courts of appeals and district courts. The Eighth Circuit's *CPC* decision, considered with the district court's *Grain Processing* ruling, gave full effect to Section 304(b) as written. In reaching their different compromises, the Fourth Circuit in the present case (*du Pont II*) and the Third Circuit in the *American Iron & Steel* decision sought to give some place to Section

[42] The petitioning potato processing companies in that case had taken that view based upon dicta in *Natural Resources Defense Council, Inc.* v. *Train*, 166 U.S. App. D.C. 312, 510 F.2d 692, 709-710 & n.101 (1975). The dicta were prompted by a description of EPA's powers and responsibilities set out in supplemental briefs filed in the *NRDC* case on the issues (1) of whether the court could responsibly mandate the issuance of Section 304(b) guideline regulations on a strict time schedule when the Agency had shown that additional time was necessary, and (2) of whether EPA was obliged to publish guideline regulations for *all* industrial classes and categories by such a flat deadline. These two issues were at the heart of the *NRDC* case but are only tangentially related, if pertinent at all, to the question before this Court in the instant cases.

In the *NRDC* case, the court issued an amendment to its original opinion to emphasize it was not ruling on the nature of EPA's regulations—

> "We do not rule on the propriety of the Administrator's regulations implementing sections 301 and 304 or on the validity of the form, format, or content of any particular effluent guidelines or limitations previously promulgated by EPA. Such matters involve questions that go beyond our present focus on the time limits contemplated by the Act for publication of section 304(b)(1)(A) effluent limitation guidelines." (510 F.2d at 710 n.101.)

304(b) in the statutory framework. In contrast, the several circuits which have approved EPA's effluent regulations as limitations under Section 301 have sanctioned eliding Section 304(b) from the Act.

Congress did not inadvertently fail to provide expressly in Section 301 for regulations. There was no oversight, such that courts should imply or infer authority to issue limitations. The regulations governing effluents from existing plants are the most important regulations to be issued under the Act. It simply is not credible that Congress would write detailed provisions for such regulations in Section 304(b), and then intend to override the Section 304(b) regulations thus expressly specified with limitation regulations inferred or implied from Section 301. See *Durousseau* v. *United States*, 6 Cranch [10 U.S.] 307, 314-315 (1810); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942). Congress wrote its intent into the statutory words; it did not leave such crucial matters to inference and happenstance.[43]

Congress had sound reasons for prescribing that the existing-source regulations be issued in the form of guidelines. Regulations in the form of guidelines would provide permit issuers with detailed instructions covering the application of technology-based requirements to many different individual plant situations. When Congress enacted the 1972 Amendments it had before it examples of guideline regulations in the form of EPA's own "guidance" documents for the Refuse Act Permit Program. EPA should be held to comply with the terms of the Act, not to its own desire as a policy matter to promulgate regulations which would negate the existence of any decision-

[43] During the Senate debate on the Conference Committee's report respecting the 1972 Amendments, Senator Muskie said

> "I would like to call attention to the fact that *we have tried in this legislation not to leave the final evaluation of the bill to the legislative history, but instead to write into law as clearly as possible the intent of Congress.*" (118 Cong. Rec. 33693 (1972), *Leg. Hist.* at 163-164 (emphasis added).)

He made these remarks in introducing for the record his own summary of the Conference Committee's deliberations. As will appear from subsequent discussion, *infra* at 60-63, Senator Muskie's summary is itself not faithful to the statutory language in certain respects.

making role for permit authorities in qualified States while at the same time arrogating to itself the power which properly belongs to such authorities.[44]

B. The Legislative History Of The 1972 Amendments Confirms The Statutory Mandate For Issuance Of Section 304(b) Guideline Regulations, Not Limitation Regulations

Before the 1972 Amendments were enacted, the Federal Water Pollution Control Act had relied solely on water quality standards which were difficult to match with a discharge from any given plant or other facility.[45] In an effort to solve this

[44] EPA's reading of Section 301 is also inconsistent with Section 301(b)(1)(C) (33 U.S.C. § 1311(b)). Subsection (b)(1)(C) provides:

> "(b) In order to carry out the objective of this Act there shall be achieved—
>
> (1) . . .
>
> (C) Not later than July 1, 1977 *any more stringent limitation*, including those necessary to meet water quality standards, or schedules of compliance, *established pursuant to any State law or regulations* (under authority preserved by section 510) or any other Federal law or regulation, or required *to implement* any applicable water quality standard established pursuant to this Act." (Emphasis supplied.)

The reference to "any more stringent limitation" (in the singular) established pursuant to State law or regulation or to "implement" a water quality standard can only refer to a limitation in a permit; it is not consistent with limitations by regulation.

[45] The Eighth Circuit described some of the difficulties in *CPC International Inc.* v. *Train*, *supra*, 515 F.2d at 1034-1035:

> "The Federal Water Pollution Control Act Amendments of 1972 restructure the federal program for water pollution control. The 1972 Act was enacted against a background of frustration and ineffectiveness in controlling the quality of the nation's waters. The keystone of the pre-1972 program had been the setting of 'water quality standards' for interstate navigable waters. Under that program, if wastes discharged into receiving waters reduced the quality below permissible standards, legal action could be commenced against the discharger. To establish that a given polluter had violated the federal legislation, a plaintiff had to cross a virtually unbridgeable causal gap by demonstrating that the cause of the unacceptable water quality was the effluent being discharged by the defendant. The enforcement mechanism of the prior legislation was so unwieldy that only one case had reached the courts in more than two decades."

See also *Environmental Protection Agency* v. *California*, —— U.S. ——, 44 U.S.L.W. 4781 (U.S., June 7, 1976).

problem, the Executive Branch looked to a seventy-year-old statute, the Refuse Act, 33 U.S.C. § 407, as a basis for a permit program to be applicable to individual dischargers. The Refuse Act Permit Program had been established by a Presidential Executive Order published on Christmas Day, 1970. See *supra*, at 14 n.21. For certain industries subject to the Refuse Act Program, EPA had prepared "guidance" documents specifying ranges of discharge levels obtainable by application of "best practicable" treatment technology.[46]

The Refuse Act Permit Program was in the process of implementation when the 1972 Amendments were being developed by Congress.[47] In writing the portions of the 1972 Amendments pertinent to these cases, Congress took upon itself the task of "conforming" the Refuse Act Permit Program and the guidance documents to its own technological objectives, and of supplying a firm statutory basis for requiring dischargers to have permits.[48]. A colloquy during hearings of the Senate Committee on Public Works between Senator Muskie and then-Assistant Administrator Quarles, now Deputy Administrator, is illustrative:

> Senator Muskie. It is going to be your objective, as I understand it, to set effluent standards which are the equivalent of secondary treatment. That is to be the standard, am I correct?
>
> Mr. Quarles. I think maybe you should develop your question a little bit more.

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[46] The "guidance" document for the inorganic chemicals industry appears at App. 8-20, R. 2550-2567. See *supra*, at 14-15.

[47] As early as September 1971 EPA announced that effluent guides for 20 industry categories including inorganic chemicals would be provided to EPA regional offices in October and would be made available to the public in November. BNA, *Environment Reporter*, Current Developments, at 570 (September 17, 1971).

[48] In *Kalur* v. *Resor*, 335 F. Supp. 1 (D.D.C. 1971), operation of the Refuse Act Permit Program was enjoined after only 21 or 22 permits had been issued. The Refuse Act Permit Program also did not cover publicly owned sewers and treatment works. See 33 U.S.C. § 407 ("any refuse matter . . . other than that flowing from streets and sewers and passing therefrom in a liquid state . . . .")

Senator Muskie. The Water Quality Standards Act undertakes to establish water quality standards that are related to the uses which the States and localities decide ought to be served by the waterways or water resources of an area or of a city . . . .

. . . .

As I understand what you are doing in order to conform your program to the water quality standards program, *you are seeking to establish effluent standards that are related to some determination as to what secondary treatment of industrial effluents may be.*

Mr. Quarles. *That is one of the objectives of the program that we are going through now studying 20 basic industries and attempting to come up with some guidelines or guidance on establishment of effluent requirements.* We had some discussion in your absence of the establishment of the water quality standards and implementation plan requirements . . . .

Industry doesn't know and nobody else does either just what they are being asked to put in, and in every case, in order for an industry to have a target to shoot for, there does need to be some sort of specification of the effluent. *We are trying to put ourselves in a better position to specify what the effluent should be, but we do not intend to adopt or issue on any wholesale flat across-the-board basis a set of effluent rules that would simply specify what the equivalent of secondary water treatment would be and then that be applied irrespective of local conditions.*

Senator Muskie. Now, I would like to identify what I think are the key policy decision areas which confront us as we try to conform your permit program with whatever legislation this committee develops.

First of all, to move toward a further development of the Water Quality Standards Act or further development of the permit system, we need an information base . . . .

The objective, it seems to me, ought to be to establish as simple and direct procedures as possible to insure assem-

bling the essential data as quickly as possible, to focus responsibility on establishment, and to minimize confusion and duplication of effort for industry or for Government. It seems to me that is the first problem we face.

Second, we have the question of timetables for the assembling of information, for filing of forms to present that information to the appropriate Government agencies, and for meeting of performance standards.

Since we have a timetable problem with respect to both permits and the water quality standards program, it seems to me that we ought to focus upon conforming the two if it is possible.

. . . .

Under the administration bill and my bill, we have a timetable. I indicated earlier that this would begin to run about January 1, 1973. It is not clear at this point how the permit program relates to that timetable. I think it ought to be made clear. If we need legislation to make it clear, we ought to have legislation to make it clear.

(*Hearings on Water Pollution Control Legislation Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 1st Sess., pt. 9 (Refuse Act Permit Program), at 4370-4371 (1971) (emphasis added) (hereinafter cited as "Senate Hearings").)

EPA had supplied the Senate Public Works Committee with summaries of its pre-guidance "state-of-the-art" papers for nine industry categories, and had told Congress of its intention to establish "guidelines" based on the information it was gathering:

> "EPA has underway an intensive program, both within the agency and under contract, to ascertain the amounts and characteristics of industrial wastes, the present technology employed to control and abate such wastes, and the technology available now and in the foreseeable future to deal with these wastes. *On the basis of this information, EPA will establish guidelines for base levels of treatment for 22 major categories of industry.* Summaries of our current information concerning the state-of-the-art are

> provided for the record with respect to the following industries: petroleum and coal products; metal and metal products; chemical and allied products; paper and allied products; machinery and transportation equipment; textile mill products; rubber and plastics; and food and kindred products.
>
> (Senate Hearings, at 449 (emphasis added).)

At that early stage, EPA knew that existing plants were sufficiently diverse that guidelines rather than single-number limitations were required. The Senate Hearings contain a reprint of a memorandum dated July 15, 1971, to EPA's Regional Administrators regarding the Refuse Act permit program. (Senate Hearings, at 1834-1835.) In the memorandum, Mr. John Quarles, then Assistant Administrator for Enforcement and General Counsel of EPA (now Deputy Administrator) referred to the ongoing industry studies and the preparation of guidance documents to give advice to the EPA permit officers:

> "After careful review, however, it has been concluded that it is not possible at this time to issue any formal set of guidelines setting forth a method of computation by which a specific discharge might be determined for general application in the Permit Program, either as the equivalent of secondary treatment or as a best available treatment. The complexities of such determinations, *together with the infinite variations from case to case*, indicate that the establishment of effluent specifications cannot be reduced to simple formula computation. . . .
>
> "The effluent computation formulas which will be furnished to you, when available, may be used to supplement existing techniques for establishment of effluent specifications. They will provide a quick method to determine whether proposed specifications are within normal *range* but will not reduce the need for careful exercise of professional judgment. We also anticipate that the additional material contained in the reports will be of great value as reference materials covering *a wide span of industrial situations*." (*Id.* at 1835 (emphasis added).)

Similarly, in the "Scope of Work" provisions in a contract to study the organic chemicals manufacturing industry in connection with the guidance program, (reprinted in the Senate Hearings, at 1838-1875) EPA stated:

> "For effluent standards to have meaning and be realistic control devices, the following must be satisfied:
>
> . . . .
>
> 3. Must be technically reasonable—generally speaking, degrees of industrial waste water treatment are as dependent on economic factors as on technological capabilities. Therefore, the same across-the-board treatment requirements for all industries are not reasonable. Different industries and *different plants within an industry require different types of effluent treatment processes. The degree of difficulty of treatment and in-plant control also varies among industries and plants.* Therefore, an effluent standards program must take into account the level and type of treatment and control a particular industry is capable of providing within current day technology." (*Id.* at 1868-1869 (emphasis added).)

The "Scope of Work" provisions direct the contractor to determine a base level of treatment which all dischargers must meet and a range of effluent requirements. (*Id.* at 1869-1874.) These policy considerations were reflected in the guidance documents.[49]

[49] For example, in the guidance document for the inorganic chemicals industry EPA described what it called "requirements" for the development of effluent guidelines. The second requirement was that "[a] *range* of achievable waste loads was to be established, with the stricter Schedule A requirements at the upper limits of the range and Schedule B at the bottom." (R. 2570 (emphasis in original).) In another part of the document EPA said that "economic and social factors may affect the practicability of applying control techniques to achieve these values, and may require some modification of Schedule A values as to particular plants. . . . Guidance on the economic and social factors which may require that you consider such modifications . . . will be provided at technical seminars to be conducted concerning each industrial category." (App. 8-9, R. 2551.)

Congress thus had a rather detailed knowledge of EPA's program of developing guidance documents for use in conjunction with the Refuse Act Permit Program. Based on this information, and its own judgment as to technological objectives and the desired interplay of State and Federal agencies in a permit system, the Senate began to develop the 1972 Amendments. The Senate Bill as reported from the Public Works Committee set a regulatory pattern confirming a permit program, providing for primary reliance on technological effluent requirements rather than water quality standards, and relying upon Federal (EPA) guideline regulations to provide the necessary flexibility for permits at existing plants. Uniform national technological objectives for effluents were specified in Section 301. These objectives were to be spelled out by guideline regulations issued pursuant to Section 304(b). And the Section 304(b) guideline regulations would provide the basis for permit authorities to set effluent limitations in permits issued under Section 402 which result in the achievement of the technological objectives of Section 301. The Senate Report on S. 2770, 92d Cong., 1st Sess., the bill which became the 1972 Amendments, succinctly summarizes this regulatory pattern:

> *"Subsection (b) of this section [304] requires the Administrator, within one year after enactment, to publish guidelines for setting effluent limitations reflecting the mandate of section 301, which will be imposed as conditions of permits issued under section 402.* These guidelines would identify what constituted the "best practicable control technology currently available" and the "best available control measures and practices," and the degree of effluent reduction attainable through the application of each. Thus, these guidelines would define the effluent limitations required by the first and second phases of the program established under section 301. In addition, the Administrator would identify control measures and practices available to eliminate the discharge of pollutants from any category of point sources, to allow the full implementation of the objectives of the Act."

(S. Rep. No. 92-414, 92d Cong., 1st Sess., at 51 (1971), 2 *Leg. Hist.* at 1469 (emphasis added).) [50]

The same statutory pattern was described in a colloquy between Senator Muskie and Senator Mathias during Senate consideration of the bill which ultimately became the 1972 Amendments:

> Mr. Mathias. Does Section 301(b)(2)(A) on page 76 contemplate that a State or the Administrator if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?
>
> Mr. Muskie. Section 301(b)(2)(A), as well as section 301(b)(1) anticipates individual application of controls under the permit program established under section 402.
>
> . . .
>
> "Criteria under Section 304(a) are to be applied in determining quality of water not in setting effluent limitations. *The information under Section 304(b) is to be applied in setting effluent limitations.*"
>
> (117 Cong. Rec. 38855 (1971), 2 *Leg. Hist.* at 1391 (emphasis added).)

The House took up its bill after the Senate has passed its version. Like the Senate, the House provided for effluent regulations for existing plants in the form of guideline regulations. (H. Rep. No. 92-911, 92d Cong., 2d Sess., at 107-108 (1972), 1 *Leg. Hist.* at 794-795.) [51]

In the House, concern centered on the role the guidelines would have in the permit process, and the degree to which EPA could review and override State permit authorities. In floor debate in the House, Representative Sikes noted that the Senate had provided for States to propose permits which would be issued upon EPA's approval [52] but that he preferred the House Committee's provision for State issuance of permits:

> "The Senate Bill would require all industry and designated plants to secure permits indicating the volume of discharge and type of pollution being discharged. The Senate version leaves all permit and enforcement policies with the Federal Environmental Protection Agency.
>
> "The House version would require EPA to provide guidelines [Section 304] and leave enforcement to the States so long as they maintain Federal standards. [Section 402] This is one of the major objections of the environmentalists."
>
> (118 Cong. Rec. 10799 (1972), 1 *Leg. Hist.* at 740.)

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[50] This pattern is restated in other portions of the Senate Report:

> "Through the permit program established under section 402, with the help of those States which have effective programs, the Administrator and the States can and should by mid-1973, be able to apply specific effluent limitations for each industrial source. . . ." (*Id.* at 44, 2 *Leg. Hist.* at 1462.)
>
> "It is acknowledged that the time allotted for publication of information under this section [section 304], is short. ***The Committee expects however, that the Refuse Act experience should enable the Administrator to comply.*** In addition, of course, the Committee desires to make it possible for State programs to qualify for participation in the permit program under section 402 as soon as possible after the date of enactment." (*Id.* at 54, 2 *Leg. Hist.* at 1472 (emphasis added).)
>
> "A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program.
>
> "The information on the technology of control developed under Section 304 should facilitate the administration of this system." (*Id.* at 72, 2 *Leg. Hist.* at 1490.)

[51] In a letter to Representative Blatnik, Chairman of the House Public Works Committee, Administrator Ruckelshaus of EPA made several comments on the pending House Bill which are pertinent here. (The letter is attached to the House Report. *Id.* at 147-171, 1 *Leg. Hist.* at 834-858.) In that letter, EPA construed Section 301(b)(1) and 301(b)(2) as calling for the achievement of "point source effluent controls", and made no mention of limitations by regulations. (*Id.* at 155-156, 1 *Leg. Hist.* at 842-843.) In the same letter, Administrator Ruckelshaus opposed shifting from "best practicable treatment" to "best available treatment", pointing out:

> "We believe that 'best practicable treatment' representing a *range* of technology should continue as a base. It is to be expected that the base or threshold of that *range* will be higher in 1976 than it is today." (*Id.* at 156, 1 *Leg. Hist.* at 843 (emphasis added).)

He said EPA favored the permit system in the Bill, adding:

> "Section 304. For the purpose of assisting the States, EPA would be required to publish . . . (2) guidelines for effluent limitations. . . ." (*Id.* at 158, 1 *Leg. Hist.* at 845.)

[52] Section 402(d)(2) of the Senate Bill had provided:

> "No [State-proposed] permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of this Act." (S. 2770, 92d Cong., 1st Sess., at § 402(d)(2) (1971), 2 *Leg. Hist.* at 1690.)

The House Bill, however, provided a veto power only where an affected State, other than one issuing the permit, objected in writing to the Administrator. (See H.R. 11896, 92d Cong., 2d Sess., §§ 402(b)(5), 402(d)(2) (1972), 1 *Leg. Hist.* at 1056–1059.) The House Bill and Committee Report adopted the view taken by State Governors and others who had "deplored the duplication and second guessing that could go on if the Administrator could veto the State decisions." (H. Rep. 92-911, 92d Cong., 2d Sess., at 127 (1972), 1 *Leg. Hist.* at 814.) The House Bill's omission of any EPA review over State-issued permits placed a greater burden on the Section 304(b) guidelines, insofar as Federal power was concerned. Representatives Abzug and Rangel submitted separate views attached to the House Committee Report. They argued that EPA should have a veto power because the Act did not call for issuance of effluent *standards* for existing plants:

> "*The Bill would repeal President Nixon's permit program and hand it over to state control* after enactment *with* no guaranteed Federal review of permits issued by States and *no national minimum effluent requirements for each State permit*. This will surely result in some companies having a competitive advantage over others and loss of jobs."
>
> (H. Rep. 92-911, 92d Cong., 2d Sess., at 398 (1972), 1 *Leg. Hist.* at 867 (emphasis added and some capitalization deleted).)

Representatives Abzug and Rangel offered two alternative proposals to the House Bill. They asked that the provisions for State permits be deleted entirely, or at least that EPA be given veto authority over State-issued permits:

> "We recommend that section 402 be eliminated from the bill, and that the present permit program, established by Executive Order 11574, be retained.
>
> "If this is not done, and the States are allowed to issue permits, then, at the very least, the bill should give EPA authority

> (a) to review all permit applications, and
>
> (b) to prevent the issuance of any permit to which it objects."

(*Id.* at 401-402, 1 *Leg. Hist.* at 870-871.)

Also in separate views to the Committee Report, Representative Terry focussed on the permit program and on the provisions for guideline regulations. However, he was concerned that the Act did not include the Administrator's promulgation of guideline regulations among the actions of the Administrator which were subject to the Bill's special judicial-review provisions:

> "Many . . . significant areas in the legislation where the administrator has a great deal of discretionary action are . . . without [judicial] review. These include . . . Section 304, the Federal guidelines . . . .
>
> "Since the permit program is fundamental to implementation of the Act, and *guidelines promulgated by EPA under Section 304 are key to the pollution control conditions for discharge under the permits,* whether issued by EPA or by a state . . . an administrative review procedure of Section 304 guidelines . . . is essential."
>
> (*Id.* at 424, 1 *Leg. Hist.* at 892 (emphasis added).)

The disagreement spilled over onto the floor of the House. During House debate, Representative Robison defended the House Committee version of Section 402(d), which had no practical veto power for EPA over State-issued permits, by referring to EPA's promulgation of guideline regulations under Section 304(b):

> "The organized environmentalists argue . . . that it is essential for EPA to retain . . . the right to veto any State-issued discharge permit . . . to insure uniform water quality standards across the Nation . . . . But these arguments miss the point that it is EPA, under the House bill, which will set, in the first instance, the uniform, national standards *by way of guidelines*—with which all State programs will have to comply. And they seem to miss . . . the further point that, if any State's pattern and practice of permit

issuance began to clearly deviate from those uniform *guidelines*, then EPA could recapture the enforcement initiative therein."

(118 Cong. Rec. 10795 (1972), 1 *Leg. Hist.* at 727 (emphasis added).)

On the floor, Representative Reuss offered an amendment which would have had the Administrator exercise a permit-by-permit review and veto authority over State-issued permits. (118 Cong. Rec. 10662 (1972), 1 *Leg. Hist.* at 576.) This Amendment was defeated by a teller vote of 154 to 251. (*Id.* at 10664, 1 *Leg. Hist.* at 582.)

The differing House and Senate Bills were resolved in a Conference Committee. The conferees did *not* provide for nationally promulgated effluent standards for existing sources.[53]

[53] The legislative history makes clear that Congress understood the differences between guidelines and standards and intended the differences because of the different functions of guidelines and standards under the Act. For example, Section 304(f)(1) provides in part:

"(f)(1) For the purpose of assisting States in carrying out programs under Section 402 of this Act, the Administrator shall publish within one hundred and twenty days after the enactment of this title, and review at least annually thereafter and, if appropriate, revise guidelines for, pretreatment of pollutants, which he determines are not susceptible to treatment by publicly owned treatment works."

Although Section 304(f)(1) requires EPA to issue pretreatment guidelines, Section 307(b) directs the Administrator in addition to issue proposed pretreatment standards within 180 days and to issue final pretreatment standards within 90 days thereafter. (Section 307(b)(3) authorizes the pretreatment standards to be published by categories of sources.) With reference to these provisions the Senate Report states:

"Section 304 . . . requires the Administrator to publish information on processes, procedures, or operating methods resulting in the elimination or reduction of the discharge of pollutants. This information is necessary to implement the standards of performance for new sources under section 306, and alternative waste treatment management techniques and systems available to implement section 301. He is also required to publish guidelines for establishing pretreatment standards for pollutants discharged into publicly owned treatment works, and guidelines for establishing procedures and test protocols the analysis of pollutants in permit applications. *It should be noted that this authority is in addition to the authority of the Administrator to establish pretreatment standards directly under section 307.*" S. Rep. No. 92-414, 92d Cong., 1st Sess. at 54, 2 *Leg. Hist.* at 1472 (emphasis added).

Rather, they retained the provisions in Section 304(b) calling for the Administrator to issue guideline regulations. The conferees did adjust the provisions in Section 402(d)(2) respecting EPA oversight of State-issued permits. The conferees adopted new language providing that the Administrator would have veto authority over State permits if such permits did not comply with the guideline regulations:

"No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit as being outside the *guidelines* and requirements of this Act."

(§ 402(d)(1) (emphasis added).)

See also S. Rep. No. 92-1236, 92d Cong., 2d Sess., at 140 (1972), 1 *Leg. Hist.* at 323 (Conference Report).

In discussing Section 304, the Conference Report addressed the fact that the effluent regulations were to be issued as guidelines under that section, and that they were to have a precise content to aid their application to individual plants in the permits:

"Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to *be precise in his guidelines* under subsection (b) of this section [304], *so as to assure that similar point sources with similar characteristics*, regardless of their location or the nature of the water into which the discharge is made, *will meet similar effluent limitations.*

(*Id.* at 126, 1 *Leg. Hist.* at 309 (emphasis added).)[54]

During consideration of the Conference Report on the Senate floor, Senator Muskie's summary was equally as explicit, and indeed emphatic, that State-issued permits had to comply with guideline regulations issued under Section 304(b) or face the Administrator's veto:

[54] Notably, the Conference Report contemplated that the limitations "within" a given category or class should be "as uniform as possible." It did not intend single number limitations regardless of differences in situations; indeed it did not state, or in any way suggest, that *similar* point sources would have to meet *identical* effluent limitations.

"The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements."

(118 Cong. Rec. 33698 (1972), 1 *Leg. Hist.* at 176.)

In the House, Representative Jones of Alabama, the floor manager for the House Conferees, compared the guideline regulations which EPA was to issue under Section 304(b) with the guideline regulations to be issued under Section 403 (respecting ocean discharge criteria).[55] Both sets of guideline regulations were to be followed by State permit authorities and were to constitute the basis on which the Administrator could veto individual permits:

"In answer to questions raised regarding changes made in section 402, relating to State permit programs, and in section 403, relating to ocean discharges, the record should show that the authority of the States to develop and administer a permit program under section 402 for discharges into the territorial sea is the same as the authority under section 402 for a State permit program for other discharges. It is the responsibility of the Administrator of EPA to establish guidelines for State permit programs. *The factors and considerations involved in setting guidelines for territorial sea discharges would necessarily differ in some respects from those established for discharges into other navigable waters.* For example, the Administrator should consider the unique situation in States where geography and other such factors have a substantial impact on the effects of the discharges on receiving waters.

"Once guidelines are established for a State permit program under section 402, whether for discharges into the

[55] Like Section 304(b), Section 403(c) explicitly requires the Administrator to "promulgate guidelines", reflecting a wide range of factors.

territorial sea or other navigable waters *it is intended that the State shall have primary responsibility for determining whether a discharge complies with the guidelines.* If the State fails to carry out its responsibility or misuses the permit program, the Administrator is fully authorized to withdraw his approval of the State plan or *in the case of an individual permit which does not meet regulations and guidelines in the act,* preclude the issuance of such permit. It is intended, however, that the Administrator shall not take such action except upon a clear showing of failure on the part of the State to follow the guidelines or otherwise to comply with the law."

(118 Cong. Rec. 33750 (1972), 1 *Leg. Hist.* at 233-234 (emphasis added).)

In large measure, principles of federalism underlie the Congressional debate and discourse concerning the nature of the effluent regulations for existing sources and the Federal review of State-issued permits. EPA now says it cannot trust the States because they may be too "lax" (see *supra*, at 19), and accordingly that it must have implied power to issue "limitations" by regulations. But EPA's arguments at this juncture cannot change the fact that Congress decided the issue of State responsibility in favor of the States. Representative John Blatnik, Chairman of the House Public Works Committee, stated the position of the Committee:

"An effective water pollution control program must have significant participation at the regional and local level. Your committee believes that the majority of the program must be handled at that level of government which is sufficiently close to the problems to recognize them and to determine what is best for the waterway and area concerned. Obviously, these local and regional efforts must be within the framework and goals set out by Congress. However, let us not kid ourselves that the Federal establishment operating by itself can implement an effective water quality program. *Unless we have meaningful local and State participation and not a Federal dictatorship, the program will founder on the rocks of the generally inflexible [,] Washington dictated approach.* Local and State initiative will disappear. Those with the most incentive to

work for local, State, and regional water quality will be stifled by Federal rigidity. We must not let this happen. We must preserve this local and State initiative.

"H.R. 11896 sets a framework and the guidelines for State water quality programs. It then provides for State implementation, or, if the States do not do the job, Federal takeover. Also, and I emphasize this, let there be no question in your minds, *this bill requires that State and regional programs follow stringent Federal guidelines. It will not allow the industrial equivalent of forum shopping. Each State's program will preclude this because they must be consistent with the guidelines.*"

(118 Cong. Rec. 10206 (1972), 1 *Leg. Hist.* at 355-356 (emphasis added).)

Representative Kluczyuski described the necessity of State attention to details even more graphically:

"I support this bill because it is absolutely sound in concept. It assigns the responsibilities where they can best be handled and *abandons the outmoded idea that all wisdom and resolution in confronting national problems is found within a 25-mile radius of the Capitol dome.*

"The States must play a prominent part in making the water pollution law work. Why should we believe their conviction is any less than ours? It is at the State and local levels where all the elements included in this bill come together, and where the job of cleaning up the water must be merged with economic and social realities."

(118 Cong. Rec. 10209 (1972), 1 *Leg. Hist.* at 363 (emphasis added).)

State authorities were not to be mere scriveners whose only task is to "mechanically crank" EPA-promulgated national standards ("limitations") into permits.[56] Where Congress desired EPA to issue national standards, it wrote language into the Act providing unambiguously for the promulgation of such standards. As the Eighth Circuit noted in the *CPC* case:

[56] The reference to "mechanically crank" limitations into permits is EPA's own characterization. It stems from the district court proceedings in this case.

"Nationally promulgated standards were expressly mandated for new sources in § 306(b)(1)(B), for toxic discharges in § 307(a)(2), and for pretreatment standards in § 307(b) and (c). In providing for national standards in these areas, Congress did four things: (1) it used the term 'standards', a word which takes on a special meaning because of its use under the Act; (2) it expressly provided that the standards were to be published by regulation; (3) it put deadlines on the process, requiring that the Administrator publish the standards within a fixed period of time; and (4) it provided that standards were to be enforceable independently of the permit system. See § 306(c); § 307(d)."

(*CPC International Inc.* v. *Train*, 515 F.2d 1032, 1038 (8th Cir. 1975).)

Moreover, at the time the law was passed in October 1972, EPA understood and agreed with the role that Congress intended the guidelines to play in the permit process. Mr. Ruckelshaus, then Administrator of EPA, in a speech before the Water Pollution Control Federation in October 1972 entitled "Local Initiative In Pollution Control", pointed out that the guideline regulations would provide the means to enable States in the permit process to consider the factors that differentiate every plant from others and to make an individual determination as to the best practicable control technology for each plant:

"We have already begun an intensive effort to begin identifying the levels of control in various industrial categories that do represent the best practicable technology now available. In doing so we are well aware—and we will act in accordance with that awareness—that there is no way that anyone in Washington can properly prepare a document that specifies the effluent limitations for all of the tens of thousands of plants across the country.

"Every plant involves individual factors that differentiate it from others and directly affect what would be the best practicable control technology for that plant. The EPA's guidelines, when they are issued, will represent the most comprehensive effort ever made on a national basis to provide information with respect to industrial waste

control technology. However, doing the job at specific plants will take the fulltime efforts of hundreds of federal and state pollution control people working as a team, and it will take years to accomplish."

(45 *Journal Of The Water Pollution Control Federation*, at 2 (1973).)

One further aspect of the legislative history deserves attention. Several of the courts of appeals had particular difficulty with the fact that the legislative history is in conflict over whether the factors set out in Section 304(b), and required by that Section to be specified in the guideline regulations, should be considered and applied to particular plants in permit proceedings. See, *e.g.*, *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027, 1042-1045 (3d Cir. 1975); *Hooker Chemicals & Plastics Corp.* v. *Train*, __F.2d__, 8 E.R.C. 1961, 1966 (2d Cir. 1976). The difficulty is not a real one, however, because the statute is not ambiguous.

Most of the trouble comes from Senator Muskie's statement purporting to provide a summary of the Conference Committee Bill.[57] In Senator Muskie's summary, he stated:

> "The Conferees intend that the factors described in Section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such a category or class."
>
> (118 Cong. Rec. 33697 (1972), 1 *Leg. Hist.* at 172.)

In contrast, the earlier Senate Report, after referring to the Section 304(b) factors, had stated:

> "In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant."
>
> (S. Rep. 92-414, 92d Cong., 1st Sess., at 50 (1971), 2 *Leg. Hist.* at 1468.)

[57] See *supra*, at 42 n.43.

The provisions of Section 304(b) in the Senate Bill were the same as those in the Bill reported by the Conference Committee.

Of course, Senator Muskie had no authority to speak for the conferees. Significantly, Senator Muskie's summary drew a sharp rejoinder from Senator Jackson, who characterized the summary as a "back-door attempt at legislation":

> "A back-door attempt at legislation through last minute speeches on the floor of the Senate is not the proper conduct of the nation's business. Fortunately, as . . . court decisions have indicated, the courts will not abide dimunition of the authority of environmental laws through the vehicle of floor speeches re-interpreting clear legislative language."
>
> (118 Cong. Rec. 33711 (1972), 1 *Leg. Hist.* at 204.)

Subsequently, in the House, Representative Dingell criticized all such efforts to make "so-called bootstrap legislative history". (118 Cong. Rec. 37059 (1972), 1 *Leg. Hist.* at 107.)

In a scholarly review and analysis of the Act, Robert V. Zener, who until recently was EPA's General Counsel, remarked that Senator Muskie's statement was of dubious worth, and may have been made because he failed to get agreement on the matter in the Confernce Committee:

> "If this statement is authoritative then EPA would be precluded from leaving any discretion at the point of individual permit issuance, whether such a course was technically possible or not. However, as noted, the Conference Report requires only that the effluent limitations within any particular class or category of sources be 'as uniform as possible'. As we have previously discussed, statements of individual conferees that go farther than the Conference Report are dubious indications of congressional [intent], since frequently such statements were made on the floor only because the individual conferee failed to get conference agreement to put the statement in the Report."
>
> (R. Zener, *The Federal Law Of Water Pollution Control*,

in *Federal Environmental Law*, at 703 n.98 (E. Dolgin and T. [illegible], ed. 1974).)

EPA has backed away from Mr. Zener's statement, and now indeed relies very heavily upon Senator Muskie's summary for the Agency's position.[58] Nonetheless, Mr. Zener's early criticism remains valid.

As the district court in the *Grain Processing* case observed, the statutory language resolves the ostensible conflict in the legislative history. The terms of Section 304(b) expressly require the factors to be applied to individual point sources:

> "Section 304(b) requires EPA to publish regulations providing guidelines for effluent limitations. Section 304 (b)(1)(A) requires EPA to [among other things not material] identify 'the degree of effluent reduction attainable . . . *for classes and categories of point sources*'. Section 304 (b)(1)(B) requires EPA to 'specify factors to be taken into account in determining the control measures and practices *to be applicable to point sources . . . within such categories or classes*'. (Emphasis supplied.)
>
> "The language is clear. It takes no construction to conclude that (A) applies to classes and categories of point sources and (B) applies to point sources within such categories and classes."
>
> (*Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 103 (S.D. Iowa 1976), *appeal pending* No. 76-1233 (8th Cir.) (emphasis by the Court).)

A similar difficulty arises respecting the Administrator's consideration of costs in promulgating the 1983-step guideline regulations. Senator Muskie's summary took the position that the Administrator should rely on a technology which could be applied with a reasonable cost, determined "without regard to cost", an obviously inconsistent approach:

> "While cost should be a factor in the Administrator's judgment, no balancing test will be required. The Administrator will be bound by a test of reasonableness. In this case, the reasonableness of what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of technology—without regard to cost."
>
> (118 Cong. Rec. 33696 (1972), 1 *Leg. Hist.* at 170.)

[58] See, *e.g.*, Assistant Administrator Kirk's letter responding to objections to EPA's proposed guidelines regulations for the inorganic chemicals industry at App. 192-195, R. 6500, 6501-6502.

Here also, Mr. Zener considered that "the statements are dubious as indications of congressional intent", since they tried to rewrite the work of the conferees. (R. Zener, *supra, Federal Environmental Law*, at 697.)

In short, some statements in the voluminous legislative history of the 1972 Amendments must be taken with a grain of salt. Certain statements do not respect the statutory language agreed by the Conferees, but aim instead at rewriting the language to retrieve positions not accepted by the Conference Committee.

Overall, however, the legislative history supports the statutory framework based upon (a) the objectives and timetables of Section 301, (b) the mandate for guideline regulations in Section 304(b), and (c) the provision in Section 402 for State issuance of permits based upon consideration of the Section 304(b) guidelines.

C. The Guideline Regulations Should Consist Of A Range Of Effluent Values Along With A Specification Of Factors

In *du Pont II* the court of appeals considered whether EPA's bare single-number effluent regulations satisfied the statute. (8 E.R.C. at 1723, App. 265.) The court recognized that other courts, particularly the Third Circuit in *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027 (3d Cir. 1975), had ruled that similar regulations were invalid because "they failed to provide meaningful ranges or guidance in considering individual factors." (526 F.2d at

1046.)[59] In *du Pont II* the court of appeals refused to accept that ranges and factors were required, and instead sanctioned EPA's use of single numbers. (8 E.R.C. at 1723, App. 265.) The court opined that ranges may be appropriate for use with some industrial category regulations but decided to defer to the Administrator as to the regulations before it, and to remit the petitioning companies to judicial review proceedings respecting permits for particular plants if they did decide to press the contention. (*Id.*)[60] Respecting the statutory factors specified in Sections 304(b)(1)(B) (1977 step) and 304(b)(2)(B) (1983 step), the court concluded that, notwithstanding the language of this Section, the factors need not be specified and elaborated in the regulations. Rather, the statutory factors were to be used by permit issuers:

> "We construe the congressional intent to be that the specified factors shall be applied by the permit issuer in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge. This construction does not derogate the power of the Administrator to issue general regulations fixing presumptively valid effluent limitations on categories." (8 E.R.C. at 1723, App. 266.)

The court of appeals misread the statute. The statutory language and the legislative history both demonstrate that a

[59] The Third Circuit rejected EPA's argument that the legislative history proved a Congressional intent that all similar plants meet uniform, identical guidelines:

> "[W]hile uniformity was clearly a major congressional concern, some amount of local variations, carefully circumscribed by precise guidelines, was contemplated. In short, *uniformity was to be achieved by effluent standards within a given category which were similar, rather than identical or unitary.*" (526 F.2d at 1044 (emphasis added).)

On this issue, the Third Circuit approved of the views expressed by the Eighth Circuit in the *CPC* case. (526 F.2d at 1044 n.38.)

[60] The court of appeals said that "[a] claim of arbitrary action in this regard may be considered in court review under § 509(b)(1)(E) of the issuance or denial of a permit." (8 E.R.C. at 1723, App. 265.) By deferring review, the court of appeals would allow EPA to maintain regulations which do not provide a proper basis for action by permit authorities. Moreover, EPA has taken the position that review of guidelines regulations may not be had in actions to review permits, apparently based on the preclusion clause in Section 509(b)(2).

range[61] and a specification of factors belong in the regulations as the Third Circuit and other courts have ruled.

1. *The statutory language and the legislative history support regulations consisting of a range along with a specification of factors.*

The language of Section 304(b) is explicit. It instructs EPA to identify "amounts of constituents and . . . characteristics of pollutants", and it expressly requires EPA to "specify factors" in the guideline regulations. (§ 304(b)(1)(A) and (B).) Where courts have applied the statutory language, they have rejected EPA's bare single-number regulations. See, *e.g.*, *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027, 1046 (3d Cir. 1975); *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 103 (S.D. Iowa 1976), *appeal* pending No. 76-1233 (8th Cir.). See also *supra*, at 37-39.

The statutory language was not the product of inadvertent congressional action. Congress focussed directly on the prob-

[61] Exceptional circumstances relating to plants in a particular category could justify use of a single number in a guideline regulation, provided that the flexibility Congress sought could nonetheless be achieved by application of the factors, as elaborated in the regulations, in fixing the limitations in a permit for a particular plant. Such circumstances might arise where the industry is comprised of a limited number of plants, all located in the same general area of the country and all of which used the same process configuration and raw material.

Another instance may arise where the plants in a specific category had and have no discharge of waste water (*e.g.*, the guideline regulations for the "Normal Rice Milling Subcategory", 40 C.F.R. §§ 406.50-406.53).

The complexities inherent in such single number regulations are illustrated by examples from the present case. Regulations required no discharge for several subcategories, *e.g.*, hydrochloric acid, 40 C.F.R. §§ 415.72 and 415.73, and sulfuric acid, 40 C.F.R. § 415.212 and 415.213. In the court of appeals EPA agreed to amend the definition of "process waste water" found at 40 C.F.R. § 401.11(g), Appendix C *infra*, at 5c, to provide for the inevitable discharge in the best run plants from minor leaks and spills, rainfall runoff, discharges associated with shut down and start up, and contamination of once-through cooling water. See *du Pont II*, at App. 271, 273-274, 275, and 282-283. Prior to the time the court of appeals set aside EPA's regulations, the Agency published proposed amendments which would have added a new set of requirements for "non-process waste water" to the several subcategory regulations to deal with rainfall runoff and leaks and spills. See 40 Fed. Reg. 7106-7109 (February 19, 1975). These proposed amendments were never promulgated in final form. Even then, EPA's proposal would have dealt with only a portion of the deficiencies in the regulations.

lem of devising regulations which conformed to the technological objectives of the Act while recognizing the enormous numbers and diversity of existing plants. The Report of the Senate Public Works Committee described how the Administrator should carry out a survey of an industry category to establish appropriate ranges in the regulations. Regarding the 1977 regulations the Committee said:

> "In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, *the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category*. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. In no case, however, should any plants be allowed to discharge more pollutants per unit of production than is defined by that base level.
>
> *"The Administrator should establish the range of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category.* It is acknowledged that in those industrial categories where present practices are uniformly inadequate, the Administrator may determine best practicable to require higher levels of control than any currently in place if he determines the technology to achieve those higher levels can be practicably applied." [62]

[62] The reference in the quotation to the "range of discharge levels, above a certain base level applicable to all plants within that category" strongly suggests that the Senate Committee had in mind the regulatory pattern of the guidance documents under the Refuse Act Permit Program. The Senate was familiar with the fact that EPA used the term "base level" in the Permit Program documents to mean a level of treatment which all discharges would be required to meet. See Senate Hearings, at 449 and at 1869, 1873 (Scope of Work provisions in contract for developing a guidance document for organic chemicals). The inorganic chemicals guidance documents fixed a range with a base level to be met by all plants (although the term itself was not used) and provided for more stringent limitations within the range. (App. 9, R. 2552; see *supra*, at 14-15 and 48 n.49.)

(S. Rep. No. 92-414, 92d Cong., 1st Sess., at 50 (1971), 2 *Leg. Hist.* at 1468 (emphasis added).)

As with the 1977 guidelines, the 1983 regulations were also to be derived after a survey of an industry category, and the regulations were again to be expressed as a range:[63]

> "In making the determination of 'best available' the Committee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above, except that rather than the *range* of levels established in reference to the average of the best performers in an industrial category the *range* should at a minimum be referenced to the best performer in any industrial category." (*Id.*) (Emphasis added.)

EPA has clung tenaciously to the position that single-number limitations in regulations conform to the statute. However, EPA in a last-minute addition to the regulations—the new section was never proposed for comment—added a "modification" provision only to the 1977-step regulations. EPA explained that the new addition would provide "flexibility":

> "Thus Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology." (39 *Fed. Reg.* at 9615, Appendix B *infra*, at 17b.)

The new "variance" provision was made applicable to all 1977-step regulations in identical terms. It permits a plant, upon a showing that the factors applicable to that plant "are fundamentally different from the factors considered in the establishment of the guidelines" to apply for limitations different from those in the regulations.[64] Upon a finding that fundamentally different factors exist, the permitting officer (EPA or the State) can fix different limitations in a permit, either more or less

[63] See also 118 Cong. Rec. 33696 (1972), 1 *Leg. Hist.* at 169 (statement by Senator Muskie).

[64] See for example 40 C.F.R. § 415.212 (Appendix B *infra*, at 69b) in the regulations relating to sulphuric acid. The use of the terms "guidelines" and "limitations" in the provision is hopelessly confused.

stringent. However, EPA's headquarters in Washington retains control, for any such different limitation must be approved by the Administrator before it becomes effective. EPA provided no guidance as to the criteria for measuring "fundamentally different factors", since the factors "considered in the establishment of the guidelines" are not set out in the regulations as Section 304(b) contemplated. EPA does point to the Development Document as specifying the factors considered. However, in the 3 pages in the Development Document devoted to a discussion of the statutory factors, EPA concludes that all have been accommodated by subcategorization and that none are relevant to individual plant permits. (Ex. R. 5644–5646.) Cf. *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 102-103 (S.D. Iowa 1976), *appeal pending* No. 76-1233 (8th Cir.) (rejecting similar declaration for corn wet milling industry).

Those courts which examined and followed the statutory language found the "variance" clause to be an inadequate response to the statutory command in Section 304(b) that factors be specified in the regulations.[65] *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526 F.2d 1027, 1046 (3d Cir. 1976); cf. *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96, 104 (S.D. Iowa 1976), *appeal pending* No. 76-1233 (8th Cir.). Each such court recognized that at least some of the statutory factors have applicability only to individual plants and could not be reflected in regulations. *E.g.*, *Grain Processing Corp.* v. *Train, supra*, 407 F. Supp. at 103-104. See also *E. I. du Pont de Nemours & Co.* v. *Train*, __F.2d__, 8 E.R.C. 1718, 1723 (4th Cir. 1976), App. 264. In *du Pont II*, the compromise

[65] The Second Circuit upheld the "variance" clause against a charge by an "environmentalist" group that the statute contemplates no deviation from limitations fixed in the regulations except in a new regulatory proceeding or by reason of an amendment to the Act. *Natural Resources Defense Council Inc.* v. *Environmental Protection Agency*, ___ F.2d ___, 8 E.R.C. 1988 (2d Cir. 1976). The Court held that a provision for variances was "peculiarly" appropriate in the context of the Federal Water Pollution Control Act because the deadline restricted EPA's sampling of plants and the regulations may well prove "ill-suited" to some unsampled plants. (8 E.R.C. at 1991-1992.) The Court, however, specifically refused to determine whether the "variance" clause will in the future be interpreted with sufficient liberality to accommodate "all legitimate demands for flexibility." (*Id.*)

adopted by the court of appeals at least moves part way toward implementing the statute. The court "construe[d] the Congressional intent to be that *the specified factors shall be applied by the permit issuer* in determining whether the presumptively valid effluent limitations should apply to a particular source of discharge." (8 E.R.C. at 1723, App. 266 (emphasis added).) The court of appeals, however, need not and should not have compromised the statutory language.

2. *The record in these cases and the experience with other industrial categories has verified the decision of Congress to require a range and a specification of factors.*

The wisdom underlying the Congressional selection of the appropriate regulatory pattern for the widely diverse existing plants is illustrated by the present case. EPA reported that in 1971 there were over 900 plants producing the 22 products covered by the inorganics regulations. (Ex. R. 5595.) Data from 80 plants were studied by the contractor; 60 plants were visited for initial screening and 28 plants were selected to be sampled by the contractor. (Ex. R. 5592.) Thus, instead of regulations based on a wide survey of the industrial plants and a range in the regulations based on these data, EPA selected one or two plants denominated "exemplary" in some cases and fixed single-number limitations based on the performance of those plants. In the eleven manufacturing subcategories in which the regulations were attacked and set aside by the Court below, with one exception EPA relied on data from one plant. (Ex. R. 5687 (hydrofluoric acid), 5899 (diaphram chlorine-alkali), 5900 (hydrochloric acid), 5901 (hydrogen peroxide–organic process), 5902 (hydrogen peroxide–electrolytic process, and nitric acid), 5905 (sodium carbonate), 5707 (sodium dichromate), 5908 (sodium silicate), 5909 (sulfuric acid), 5910 (titanium dioxide).) In the mercury cell chlorine-alkali subcategory (comprising 63 plants in the United States), EPA relied upon data from three plants (one in Canada). (Ex. R. 5900.)[66]

[66] The plants relied on by EPA were labelled "exemplary" in four instances, Ex. R. 5683, 5687 (subsequently the data from this plant were shown to be in error, see 40 *Fed. Reg.* 1712 (January 9, 1975)), 5900, 5725.

The legislative history shows that the starting point Congress contemplated

EPA's discussion and rejection of the statutory factors set out in Section 304(b) occupies three pages in the Development Document. (Ex. R. 5644-5646.) The superficiality of EPA's refusal to specify the factors is illustrated by EPA's acknowledgement, in the course of its treatment of the factors, that geography had an impact on the feasibility of various treatment alternatives, *e.g.*, EPA said evaporation ponds are functional only where evaporation exceeds rainfall. (Ex R. 5646.) Nonetheless, EPA adopted uniform requirements for ponds which permit overflow only in catastrophic rains, which the Court below correctly pointed out requires in a net-rainfall area an "infinitely expanding pond to contain all the rainfall." (8 E.R.C. at 1726, App. 272.) This is but one illustration of the consequences of the application of single-number limitations in mechanical style to plants in different situations.

Other examples abound. In *FMC Corp.* v. *Train*, __ F.2d __, 8 E.R.C. 1731 (4th Cir. 1976), the Fourth Circuit set aside and remanded EPA's effluent regulations for the plastic and synthetic materials industry. In part, the court based its decision upon EPA's failure to account for diverse wastewater flows found among plants in a given product subcategory:

> "Given these observations [data collected and analyzed by EPA's contractor], petitioners contend that EPA was arbitrary in selecting a single hydraulic flow from a wide range of flows and then applying this level of water usage uniformly throughout a subcategory.
>
> "The ranges in hydraulic flows found among plants in the subcategories bear witness to the contractor's conclusion that there is no uniform water usage per unit of product manufactured. The following are a few examples. In the polyvinyl chloride subcategory: demonstrated wastewater flow is 1,800 gallons per 1,000 pounds of product, range is 300-5,000 gallons. For celluose acetate (resin): demonstrated wastewater flow is 5,000 gallons per 1,000 pounds of product, range is 2,000 to 20,000 gallons. For rayon: demonstrated wastewater flow is 16,000 gallons per 1,000 pounds of product, range is 4,000 to 23,000 gallons.
>
> "EPA in its brief admits that substantial questions have been raised concerning the hydraulic flow chosen for 1977 in the acrylics subcategory. We think there are substantial questions in the other categories as well and direct EPA to re-examine its use of uniform hydraulic flows for purposes of calculating the regulations in this industry."
>
> (8 E.R.C. at 1736 (footnote omitted).)

Similarly, for the corn wet milling industry, the reviewing court set aside the effluent guidelines because EPA's single-number regulations did not and could not reflect that industry's diversity:

> "There is evidence the quality of the waste water varies with the particular product that is being produced. Highly modified starches result in higher waste loads per unit of raw material. EPA recognized this fact but could not, on the available data, distinguish a 'relationship between the raw waste characteristics from all the mills and their product mix . . .'. Id. at 111. Individual plants vary in the percentage of highly modified starches produced and in each plant the product produced varies from day to day.
>
> "It is thus clear that the EPA recognizes that each plant in the corn wet milling industry is unique and that the application of identical technology will not lead to similar results. Although the EPA recognizes that corn wet mills deserve special consideration, it has not formulated a detailed approach for issuing individual permits. This decision to omit a detailed methodology is an arbitrary and capricious one."
>
> (*Grain Processing Corp.* v. *Train*, 407 F.Supp. 96, 104 (S.D. Iowa 1976), appeal pending No. 76-1233 (8th Cir.).)

EPA's insistence on bare single-number effluent regulations has caused substantial dislocations in the permit-issuing process

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for the guidelines is industry-wide performance within the relevant industry subcategory. See *supra* at 66-67. The only exception was for "those industrial categories where present practices are uniformly inadequate . . ." (S. Rep. 92-414, 92nd Cong., 1st Sess. at 50 (1971), 2 Leg. Hist. at 1268.) Thus Congress contemplated a survey of at least a representative sampling, not reliance on a single plant, unless a determination from a survey demonstrated that performance of existing plants was "uniformly inadequate." EPA made no finding as to any of the eleven subcategories that the treatment by the plants in the subcategory was "uniformly inadequate."

and has hampered and delayed administration of the Act. The court in the *Grain Processing* case described the difficulties:

> "*From the point of view of a permit-issuer, the EPA approach is wholly unsatisfactory.* For the most part, the permit issuing authority will be working with no clearly defined methodology in determining the application of the appropriate technology for each plant. *The state agencies, subject to EPA approval, are to play an important role in cleaning the nation's waterways. But the product of the EPA does not allow the states to fulfill that role.* The EPA's efforts have been almost solely directed at arriving at single-number guideline regulations. *Application of these numerical values to each corn wet mill reduces the state agencies to mere conduits.* If the Congress had desired to make the permit issuing function only EPA's concern, it could have done so. But the Congress did not take this course. It set up a carefully defined program with responsibilities to the states. Section 101(b)." (*Id.*, 407 F.Supp. at 104-105 (emphasis added).)

In September 1973 the Effluent Standards and Water Quality Advisory Committee ("ESQUIAC"), the scientific advisory board established by Congress in Section 515 of the Act to review proposed regulations and provide advice to EPA, prepared a report to the Administrator evaluating EPA's procedures (App. 181-187, R. 6472-6491). The report concluded:

> "*The Committee has found the current procedures for establishing effluent limitation guidelines* for point source industrial discharges *to be un-scientific* in their disregard of the following items and/or variables:
>
> 1. Little consideration has been given to the erroneous and/or incomplete data on which many of the initial draft contractors' reports were based.
>
> 2. Little consideration has been given to great differences in individual facilities among generic industries with regards to RAW WASTE LOAD: SIZE OF PLANT: AGE AND TYPE OF PROCESS EQUIPMENT NOW OPERATING IN A GIVEN PLANT: CLIMATE AND GEOGRAPHIC LOCATION FACTORS.

. . . .

> 4. ECONOMIC EQUITY has been disregarded with respect to instructions in Sect. 304(b) involving cost of application of practical and available technology, particularly as these relate to SMALL PLANTS within generic industries.
>
> 5. SPECIFIC EXAMPLES where these items have not been given adequate consideration are to be found in the following studies and published proposed limitations:
>
> | | |
> |---|---|
> | SEAFOOD PROCESSING | PLASTICS AND SYNTHETICS |
> | INORGANIC CHEMICALS | CEMENT |
> | FRUITS AND VEGETABLES | MEAT PACKING |
> | STEAM ELECTRIC POWER | IRON AND STEEL |
>
> (Others not cited here)
>
> 6. Little consideration for some industrial sectors has been given to utility of the guidelines to actual permit conditions in regions." (App. 181-182, R. 6472-6473 (emphasis added).)

The Committee's report proposed a method of developing guidelines, commonly referred to as the Matrix Method, which would have provided a means for considering factors at the time of permit issuance.

EPA disregarded not only the clear command in the statute that it establish a procedure or method in regulations under Section 304 to assure that the technological goals of the statute be achieved, but also to assure that the wide range of differences in individual plants was taken into account by the permit authorities within the limits or range fixed in the regulations. ESQUIAC's call on scientific grounds for EPA to comply with the statute also went unheeded.

D. EPA's Present Assertions Are Not Entitled To Any Special Deference From This Court

Courts have said that an administrative construction of a statute, and more particularly, a contemporaneous construc-

tion, by the agency charged with the duty of applying it is entitled to respect. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 84 (1932); *United States* v. *Philbrick*, 120 U.S. 52, 59 (1887); cf. *Stuart* v. *Laird*, 1 Cranch [5 U.S] 299, 309 (1803) ("the question is at rest, and ought not now to be disturbed"). However, this judicial deference or respect does not apply to a construction of a statute which represents a turnabout from an original contemporaneous construction. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 279-80 (1966); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *cf. Train* v. *Colorado Public Interest Research Group, Inc.*, __ U.S. __, 44 U.S.L.W. 4717, 4719 n. 8 (U.S. June 1, 1976).

At the time the 1972 Amendments were being enacted, EPA was engaged in an effort to develop guidance documents for 20 or more industrial categories. See *supra*, at 14 n.20. The range of effluent values set out in these guidance documents was premised upon application of "best practicable technology", which the 1972 Amendments adopted as the technological objective both to be reflected in the 1977-step guideline regulations under Section 304(b) and to be achieved by point sources by July 1, 1977 under Section 301. EPA initially sought to convert these guidance documents into guideline regulations.

Gradually, from mid-1973 through the early months of 1974, EPA shifted focus from guideline regulations, first to "nationally uniform" rules,[67] and then to "effluent limitations guidelines" which actually were (and are) effluent limitations regulations. See *supra*, at 19-22, and 59-60.

EPA's change in position constitutes an "unwarranted volteface" from its earlier contemporaneous construction of the Act. *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 279 (1966). This situation is very similar to that presented in *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956). In that case, the Court rejected a "more recent *ad hoc* contention as

[67] See former Assistant Administrator Kirk's letter responding to comments, (App. 193, R. 6501), and the discussion *supra* at 19.

to how the statute should be construed", saying: "*There are persuasive reasons for construing* 'debentures' and 'certificates of indebtedness' *in accordance with the Treasury's original interpretation of those terms* in this statute's altogether comparable predecessors." (*Id.* at 396 (emphasis added).) Accord, *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 279-80 (1966).

Previously, EPA has relied upon *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975), to suggest that deference be accorded to its asserted position. Such reliance is misplaced. The Court in that case carefully examined a truly contemporaneous construction by EPA of Section 110 of the Clean Air Act and adopted that construction upon the ground that the construction was firmly rooted in the words of the statute. The Court rejected alternative interpretations by a number of courts of appeals which had relied in some instances on "Solomonesque" judgments not tied to any specific statutory language. (421 U.S. at 73.). Here the shoe is on the other foot. Petitioners, not EPA, support the Agency's own original and contemporaneous construction of the Act grounded in the statutory language.

E. Because The Act Was Structured To Accommodate Guideline Regulations Under Section 304(b), To Force-Fit Promulgation Of Limitations By Regulation On The Statutory Scheme Would Have Adverse Collateral Consequences

Various sections of the Act depend upon or tangentially relate to the promulgation of effluent regulations for existing plants. These statutory cross-references and interdependent provisions were structured to accommodate guideline regulations under Section 304(b), not limitation regulations under Section 301. To force-fit promulgation of limitations by regulation onto the statutory scheme would create a series of adverse collateral consequences. The difficulties in accommodating EPA's present contentions to the Act confirm that the Agency's present position misreads the Act's provisions.

1. *Section 515 expressly calls for Advisory Committee review of regulations under Section 304(b), not Section 301.*

Section 515 of the Act, 33 U.S.C. § 1374, establishes an Effluent Standard And Water Quality Information Advisory Committee made up of distinguished scientists "to provide, assess, and evaluate scientific and technical information on effluent standards and limitations". (§ 515(a)(2).) To enable the Committee to perform its function EPA is required to advise the Committee of the Agency's intent to publish regulations. Section 515 specifically refers to regulations under Sections 304, 306, and 307. There is no reference to Section 301. (See § 515(b)(1).) There is not the slightest evidence that Congress foresaw or intended that EPA would issue regulations and claim that they were Section 301 regulations. Congress would specifically have provided for review by the Committee of regulations under Section 301 had it intended such regulations to be issued.

2. *The provisions for periodic review by EPA contemplate guideline regulations.*

After promulgation of the guideline regulations, Section 304(b) requires the Administrator "at least annually thereafter, [to] revise, if appropriate, such regulations". In contrast, subsection 301(d) provides for review of effluent limitations every five years:

> "(d) Any effluent limitations *required by paragraph (2) of subsection (b)* of this section shall be reviewed at least every five years and, if appropriate, revised *pursuant to the procedure established under such paragraph.*"
>
> (§ 301(d) (emphasis added).)

The only "procedure" established by paragraph (2) of subsection (b) is the provision that effluent limitations for 1983 shall require the application of best available technology economically achievable "as determined in accordance *with regulations issued by the Administrator pursuant to section 304 (b)(2)* of this Act. . . ." (§ 301(b)(2)(A) (emphasis added).) Thus, the "procedure" to which subsection (d) refers is the promulgation of regulations under Section 304(b).

This becomes all the more apparent in considering the purpose of Sections 301(d) and 304(b). The purpose of subsection (d), as the Senate Report explained, was to provide for the program after 1981 (1983 in the final bill). Thus, the Senate Committee's Report said (with reference to Section 301(c), which became 301(d) in the final bill):

> "The Committee has established a procedure to continue the program beyond 1981 [1983 in the final bill]. Under this provision, the procedures and requirements of Phase II would be repeated every five years for those sources of pollution which would not have to achieve the no discharge requirement in Phase I (if required to meet water quality standards) or Phase II, or in an earlier five-year phase."
>
> (S. Rep. No. 92-414, 92d Cong., 1st Sess., at 46 (1971), 2 *Leg. Hist.* at 1464.)

The five-year period thus was selected in part because the Senate bill, S. 2770, had provided for the best practicable standard to be achieved by 1976 and the best available standard to be achieved by 1981—a five-year interval. (S. 2770, 92d Cong., 1st Sess. (1971), 2 *Leg. Hist.* at 1608-1610.) More importantly, a permit issued under Section 402 ordinarily has a five-year term. (§§ 402(a)(3), 402(b)(1)(B).) Thus, Section 301 (d) was designed to mesh with the direction to the Administrator to issue a new round of permits on a five-year cycle after 1983. On the other hand, the Administrator was to review and update the guideline regulations under Section 304(b) on an annual basis.

These provisions for periodic review do not make sense if regulations are to be issued under Section 301 as well as Section 304. The Fourth Circuit had trouble with the review provisions as a result of its compromise position that EPA could issue "presumptively applicable" limitation regulations. In a decision announced on the same day as *du Pont II* was decided, the Fourth Circuit opted for annual review of limitation regulations, on the ground that it was "appropriate":

> "Section 304(b) provides that § 304 guidelines be revised, if appropriate, at least annually, and § 301(d) has

> a similar requirement for § 301 limitations at five-year intervals. Since the Administrator asserts that these regulations are "effluent limitations guidelines" satisfying both § 301 and § 304, . . . this Court feels that an annual revision is appropriate."
>
> (*Tanners' Council of America, Inc.* v. *Train*, __F.2d__, 8 E.R.C. 1881, 1886 n.16 (4th Cir. 1976).)

The Fourth Circuit need not have made such an arbitrary choice if it had followed the statute's prescription for guideline regulations.

3. *Unlike new source standards issued pursuant to Section 306 or pretreatment standards issued under Section 307(b) and (c), "effluent limitations" are not enforceable independently of permits.*

Section 309 of the Act, 33 U.S.C. § 1319, prescribes enforcement mechanisms and remedies to deal with violations of the Act. Sections 309(a)(3), (c), and (d) all proscribe violations of "section 301 . . . or . . . any permit condition or limitation". If the reference to a violation of Section 301 contemplated limitation regulations, it would duplicate the reference to violations of permit conditions. (EPA argues that its limitation regulations must be mechanically cranked into permits.) However, as the Eighth Circuit pointed out, "[Section] 301(a) prohibits discharging *without* a permit, and it is to that conduct which § 309 is addressed." *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1043 (8th Cir. 1975) (emphasis by the Court).[68]

Also, in direct contrast to the effluent guideline regulations, the new source standards issued pursuant to Section 306 and the pretreatment standards issued under Section 307(b) and (c) are independently enforceable. (See §§ 306(e), and 307(d), and *supra*, at 8-9.) There is no comparable provision making it unlawful to fail to comply with effluent regulations for existing

[68] In addition, Section 301(f) makes it "unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters."

sources. Enforceable "limitations", as the term is used in Section 309, arise only in permits.[69]

4. *The citizen-suit provision, Section 505, does not contemplate limitation regulations.*

Section 505 of the Act, 33 U.S.C. § 1365, authorizes private citizens to bring civil actions in Federal district courts to seek injunctions enforcing certain of the Act's provisions. Such an action can be brought against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . ." (§ 505(a)(1).) Section 505 specially defines "effluent standard or limitation under this Act" as:

> "(1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of the Act; . . . or (6) a permit or condition thereof issued under section 402 of this Act. . . ." (§ 505(f).)

Each segment of this definition covers a different matter, and the definition does not contemplate EPA limitation regulations.

[69] Furthermore, Section 402(k) expressly provides that compliance with a permit condition will be deemed to be compliance with the requirements of Section 301 and other sections.

Section 402(k) also has an important bearing on the new source standards, especially respecting the role of the new source standards in the permit process. See the opening brief in Nos. 74-1473 and 75-1705, at 6-9.

Putting aside Section 402(k), a massive new criminal code would be generated by inference if this Court were to find an authorization to issue limitations by regulation under Section 301, and then to consider that such limitation regulations were independently enforceable. Canons of statutory construction dictate that Congress define criminal conduct clearly, and that criminal statutes be construed narrowly:

> " 'When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.' *United States* v. *Universal Corp.*, 344 U.S. 218, 221-222 (1952)." (*Toussie* v. *United States*, 397 U.S. 112, 122 (1970).)

Section 505(f)(1) refers to the Section 301(a) prohibition on making any discharge without a permit. Paragraph 505(f)(2) covers three separate matters. First, it encompasses the prohibition in Section 301(f) against discharges of radiological, chemical, and biological warfare agents and high-level radioactive wastes. Second, it covers the limitations fixed by the Administrator for an individual point source pursuant to Section 301(c), relating to modification of the 1983-step requirements for economic reasons. And third, it also bears on the "water quality related effluent limitations" issued by order by the Administrator under Section 302 for an individual "point source or group of point sources" (§ 302(a)), after specially prescribed hearings have been had and certain findings have been made. (§ 302(b).)[70] Paragraph 505(f)(6) relates to the limitations in a permit.[71]

5. *Congress did not intend to require review now of the 1983-step regulations, and premature review actions would have to be brought if limitations are to be promulgated by regulation.*

In *du Pont II* the court of appeals objected to the circumstance that it had before it challenges to regulations applicable far in the future. The guideline petitions sought review of, among other things, 1983-step regulations which governed

[70] The Senate Report respecting the 1972 Amendments states that the "limitations" authorized under Section 302 are to be established on a "case-by-case" basis, and not by regulation:

> "The Committee has included language in this section requiring that *in the determination of effluent limitations based* on water quality, consideration must be given, *on a case-by-case basis*, to a balancing of the economic and social costs against the social and economic benefits sought to be obtained."

(S. Rep. No. 92-414, 92d Cong., 1st Sess., at 47 (1971), 2 *Leg. Hist.* at 1465 (emphasis added).)

[71] This construction of Section 505(f) accords with the interpretation of the Sections made by the Eighth Circuit in *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1043 (8th Cir. 1975). Compare the different interpretation found in *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442, 451 (7th Cir. 1975), and *American Frozen Food Institute* v. *Train*, ___ U.S. App. D.C. ___, ___ F.2d ___, 8 E.R.C. 1993, 2006 n.5 (1976).

effluent levels to be achieved roughly seven years hence. (8 E.R.C. at 1725, App. 268-270.) The court of appeals observed that Section 304(b) required the publication of both 1983-step and 1977-step regulations within one year after enactment of the 1972 Amendment. The petitioning companies then had to seek review within 90 days after issuance of the regulations, if the special review provisions of Section 509(b)(1) were applicable. (*Id.*) Section 509(b)(1) provides that

> "Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days. . . ."

In *du Pont II* the court of appeals said it would not "engage in speculation" as to the 1983-step regulations. (8 E.R.C. at 1725, App. 270.) The court set aside 1983-step regulations for production of chlorine, hydrochloric acid, hydrofluoric acid, hydrogen peroxide, nitric acid, sodium carbonate, sodium dichromate, sodium metal, sodium silicate, sulfuric acid, and titanium dioxide. (8 E.R.C. at 1731, App. 284-286.) The court of appeals in each instance found no support in the record for EPA's regulations.

In contrast, in a case decided the same day, *Tanners' Council of America, Inc.* v. *Train*, __F.2d__, 8 E.R.C. 1881 (4th Cir. 1976), the court of appeals refused to remand to EPA the 1983-step leather tanning effluent regulations there before it. The court viewed review as "premature", and offered the advice that review could be obtained later under a provision of Section 509(b)(1) authorizing review after the generally applicable 90-day period had passed, where the review application is based solely on grounds arising after the ninetieth day. (8 E.R.C. at 1886-1887.)

The Fourth Circuit obviously was uncomfortable in carrying out review of the 1983-step regulations at this stage, but the

difficulty was of its own making. If the court had required adherence to the statutory pattern of guidelines rather than accepting "presumptively applicable" limitations as a compromise position, it would not necessarily have had to carry out review now of the 1983-step effluent regulations. Congress did not insert Section 509(b)(1)(E) into the Act to provide review of "limitation" regulations, and the "premature" review of the 1983-step regulations is another of the adverse collateral consequences which arises if promulgation of limitations is injected into the statutory scheme by inference.

6. *Section 509 (b) (1) (E) was provided by Congress primarily to provide review of EPA action on State-issued permits, but EPA would give no effect to this intent.*

Congress included Section 509(b)(1)(E) to authorize review in the courts of appeals of EPA action in reviewing the terms of a State-issued permit.[72] Among other things this provision solved for Congress the problem of how federal review could be obtained for a State-issued permit. Congress could, and did, premise federal judicial review upon and provide such review for the one aspect of federal involvement in the otherwise entirely State proceeding.

Section 509(b)(1)(E) speaks of review of the Administrator's action in "approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306". The Administrator "approves" a limitation when he reviews a State permit under Section 402(d) to determine whether it meets "the guidelines and requirements of this Act" (§ 402(d)(2)),

[72] Section 509(b)(1)(E) also provides for review by the courts of appeals of the Administrator's action in "promulgating" limitations directly by order for a particular point source under Sections 301(c) and 302. The Administrator is authorized and directed by Section 301(c) to set such special limitations, which modify otherwise applicable 1983-step requirements, if certain economically related factual tests are met. Section 302 authorizes the Administrator to establish special "water quality related effluent limitations" for an individual "point source or group of point sources."

and then does not veto the permit.[73] By using the guideline regulations, the State has already set the "effluent limitations" in the permit, within the meaning given effluent limitations in Section 502(11) of the Act.

As a consequence of its argument for limitations regulations, EPA would treat the word "approving" in Section 509(b)(1)(E) as redundant and having no function. In fact, it serves the very important purpose of providing the *only* avenue to obtain judicial review of EPA's determinations in acting on a State-issued permit. Section 509(b)(1)(F) authorizes review by a court of appeals of EPA's action "in issuing or denying any permit under section 402", but the type of action on a permit described in subparagraph (F) arises only when EPA's regional offices themselves constitute the permit authority, rather than the States. The regional offices have such authority where the pertinent State does not have an approved permit program.

This construction of the "approving" language is confirmed by the references in Section 509(b)(1) to actions respecting new sources under Section 306. Section 509(b) contains two separate provisions pertinent to review of EPA's actions under Section 306, one of which would be without meaning under EPA's presently advocated position. Section 509(b)(1)(A) provides for review of standards of performance issued by EPA under Section 306. Section 509(b)(1)(E) also provides for review of the Administrator's action in "approving or promulgating any effluent limitation or other limitation under sections 301, 302, *or 306*" (emphasis added). The only regula-

[73] Earlier versions of the bill that became the Federal Water Pollution Control Act Amendments of 1972 actually required EPA to take the affirmative step of approving the permit's effluent limitation before the State-proposed permit could become effective. S. 2770 (the bill which ultimately became law) in the form in which it was passed by the Senate provided that: "No permit shall issue until the Administrator is satisfied that the conditions to be imposed by the State meet the requirements of the Act." (S. 2770, § 402(d)(2), 92d Cong., 1st Sess. (1971), 2 *Leg. Hist.* at 1690.) Understandably, at that time the language of Section 509(b) contained the "approving or promulgating" reference (see *id.* at 1713) which it still retains, although in the enacted version of the bill the EPA review function has changed slightly to one of having to make a disapproval. See *supra*, at 51-55, for a discussion of the legislative history underlying this change.

tions to be promulgated under Section 306 are the new source standards, not limitations, and Section 509(b)(1)(A) provides for review of those standards. The only "approval" by the Administrator could be of effluent limitations for a "new source" fixed by a State in a permit in conformity with the new source standards. If Section 509(b)(1)(E) does not refer to such Federal approval of State-initiated and issued limitations for new sources, this Section's reference to Section 306 is meaningless.

A reference to "promulgating" limitations is necessary in Section 509(b)(1)(E) because the Administrator does promulgate limitations by order issued respecting an individual plant under the limited and circumscribed circumstances set out in Section 301(c)[74] and Section 302.[75] These specially set limitations can be important to the particular plant involved, and Congress logically provided for review of the Administrator's action in imposing them.

7. *Summary.*

A variety of provisions in the Act were drafted to accommodate a statutory system in which EPA would promulgate guideline regulations under Section 304(b), and in which either the States or EPA then would set limitations in permits depending upon who had authority in the local area. Superimposing by inference a scheme for promulgating limitations by regulation does violence to the pattern of the Act. Some provisions are made redundant or rendered purposeless. Section 515 and parts of Sections 309, 505, and 509 are in this category. Others are infused with new meaning which radically transforms their effect to the detriment of sound administration of the Act. Parts of Sections 309, 505, and 509 would be so affected.

The fact that these unintended adverse effects would occur if EPA were to prevail demonstrates that this Court should

[74] The "limitations" issued by order under Section 301(c) pertain to cases where the otherwise applicable 1983-step requirements have been modified for economic reasons. See *supra*, at 83 n.73.

[75] The "limitations" set pursuant to Section 302 are more stringent requirements imposed for water quality reasons. See *supra*, at 80 n.70.

adhere to the statutory language and reject EPA's arguments for an inferred power. The interpolation sought to be made is not reasonable in these circumstances.

II.

FEDERAL DISTRICT COURTS, NOT COURTS OF APPEALS, HAVE INITIAL JURISDICTION TO REVIEW EPA'S EFFLUENT REGULATIONS (GUIDELINES) FOR EXISTING PLANTS

In these cases, the jurisdictional issues are but a short tail to a large dog. *I.e.*, the Court necessarily must consider and resolve the important statutory construction issues respecting the nature of EPA's regulations prior to deciding whether initial jurisdiction of an action to review the regulations lies in the district courts, or the courts of appeals, or may be brought in both. *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132 (1940); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968); *cf. National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 456 (1974); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell* v. *Hood*, 327 U.S. 678 (1946).

A. Actions For Review Of Guideline Regulations Should Be Brought In Federal District Courts Under The Administrative Procedure Act; The Special Review Provisions Of Section 509(b), Calling For Original Proceedings In The Courts Of Appeals, Do Not Apply

1. *The Act establishes a bifurcated system for review actions.*

The Act contemplates a scheme of bifurcated jurisdiction to review the varied administrative actions taken under its terms. This circumstance is not unusual. See, *e.g.*, *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132 (1940) (construing the Communications Act of 1934); *Cheng Fan Kwok* v. *Immigra-*

tion and Naturalization Service, 392 U.S. 206 (1968) (construing the Immigration and Nationality Act). In this instance, Congress has provided three separate jurisdictional bases for this bifurcated system.

First, Section 509(b) sets out a series of six expressly specified actions taken by the Administrator which are subject to review on petition in courts of appeals. (§ 509(b)(1)(A)-(F).) Second, Section 505 provides for jurisdiction in district courts over civil actions by private citizens seeking injunctive relief respecting certain specified violations of the Act or of administrative regulations and orders under the Act. (§ 505(a).) Third, district courts have jurisdiction to review all actions taken by agencies and officials other than the EPA and its Administrator, and to review many actions of the Administrator (those not specified in Section 509(b)(1)),[76] based upon Section 10 of the Administrative Procedure Act, now codified as 5 U.S.C. §§ 701-706, upon 28 U.S.C. §§ 1331, 1332, 1337, 1361, and 1651, and upon the Declaratory Judgment Act, 5 U.S.C. § 2201-2202. See *Natural Resources Defense Council, Inc.* v. *Train*, 171 U.S. App. D.C. 151, 154-155, 519 F.2d 287, 290-291 (1975); *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1038 & n.12 (8th Cir. 1975); *cf. Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 651-653 (1973); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 209-210 (1968); *Oljato Chapter of the Navajo Tribe* v. *Train*, 169 U.S. App. D.C. 195, 204-206, 515 F.2d 654, 663-665 (1975).

The jurisdictional issues before the Court in these cases stem from this bifurcated jurisdictional framework, *i.e.*, which of these jurisdictional routes is the one prescribed by Congress for review of EPA's effluent regulations for existing plants.

2. *Review actions for guideline regulations should be brought in the district courts, not in the courts of appeals.*

Because Section 509(b)(1) authorizes special review in the courts of appeals for certain actions, the Court's inquiry should

[76] Appendix D, *infra* at 1d-5d, contains a sample listing of a number of administrative actions to be taken under the Act by the Administrator which are subject to review under the Administrative Procedure Act.

focus first on the language of that Section. The Administrator's action in promulgating guideline regulations under Section 304(b) is not among the six categories of action specified in Section 509(b)(1)(A)-(F). Moreover, the Section does not mention or refer in any respect to Section 304.

In Section 509(b)(1), Congress provided that "Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under sections 301, 302, or 306 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business. . . ." This provision was written into the Act primarily to authorize review in the federal courts of appeals of EPA action in reviewing the terms of State-issued permits. See *supra*, at 82-84. Such "limitations" in State permits may be for a new source as well as for an existing source, which accounts for the reference to Section 306 in Section 509(b)(1)(E). This jurisdictional clause also serves a secondary purpose in providing review by courts of appeals of the Administrator's action in establishing limitations directly by order for a particular point source under Section 301(c) or under Section 302. See *supra*, at 82 n.72, 84 & nn.74-75. It does not contemplate issuance of limitations by regulation.

As discussed previously, there is no statutory basis for EPA to issue limitation regulations. The Act mandates that EPA issue guideline regulations, and under the jurisdictional framework just described, review of such guideline regulations should be had initially in the district courts under the Administrative Procedure Act and the related generally applicable jurisdiction and venue provisions of the Judicial Code. *CPC International Inc.* v. *Train*, 515 F.2d 1032, 1037-1038 & n.12 (8th Cir. 1975).

The majority of those courts of appeals which have accepted jurisdiction over original review actions have done so on the basis that EPA has an inferred authority to issue limitations regulations, of one type or another, which limitations fall within the ambit of Section 509(b)(1)(E). See *American Iron and Steel Institute* v. *Environmental Protection Agency*, 526

F.2d 1027 (3d Cir. 1975) (jurisdiction implied); *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442 (7th Cir. 1975); *Hooker Chemicals & Plastics Corp.* v. *Train*, __F.2d__, 8 E.R.C. 1961, 1963-1967 (2d Cir. 1976); *American Frozen Food Institute* v. *Train*, __U.S. App. D.C.__, __F.2d__, 8 E.R.C. 1993, 2004 (1976). These decisions rest on the faulty premise that the Administrator was given by Congress an inferred direction to issue limitations by regulation.

3. *Policy considerations do not provide a sound basis for construing Section 509(b) in a strained fashion to encompass guideline-regulation review actions.*

Two courts of appeals have divorced their decision on these jurisdictional issues from the underlying substantive context. In *American Petroleum Institute* v. *Train*, 526 F.2d 1343 (10th Cir. 1975), the Tenth Circuit ruled that jurisdiction initially to entertain review actions to review EPA's effluent regulations was with the courts of appeals, on grounds suggesting that the Administrator's assertions could affect the court's jurisdiction. The court reasoned that the Administrator asserted he had statutory authority to issue limitations and the exercise of such asserted power had jurisdictional consequences. (*Id.*, 526 F.2d at 1345.) The Tenth Circuit explicitly declined to consider "any issue bearing on the statutory power of the Administrator to promulgate effluent limitations on existing sources by regulations or, if the power exists, the manner in which it is to be exercised." (*Id.*, 526 F.2d at 1346.) This approach is surely wrong. An assertion of authority by the head of an administrative agency, standing alone, cannot confer jurisdiction on one court and oust another. *Cf. Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 210 & n.9 (1968). The pertinent court must conduct an independent examination of its jurisdiction, including in a case such as this the substantive context to which the jurisdictional provisions relate and upon which they depend. See *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, 135-138 (1940); cf. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 419-423 (1965).

In a somewhat similar vein, the Fourth Circuit in *du Pont I* ruled that it had jurisdiction under Section 509(b) to review EPA's effluent regulations even if they were guideline regulations under Section 304(b) and not limitation regulations under Section 301. Judge Widener's opinion for the court of appeals considered that the guideline regulations would be necessary precursors to limitations in permits and thus that any reference in Section 509(b) to limitations under Section 301 must also encompass the guideline regulations:

> *"Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives.* If § 301 is to be viewed in the manner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, 'guidelines for effluent limitations' must be promulgated under § 304(b). Construed in this light, *any action taken by the Administrator under § 304 (b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509."*
>
> (528 F.2d at 1142, App. 250 (emphasis added).)

For these results, the court of appeals relied heavily upon "[t]he practical difficulties" of a determination that review of guideline regulations was initially in the district courts. (528 F.2d at 1141 n.5, App. 249.) The court noted that review of the EPA's issuance of standards for new plants was unquestionably in the courts of appeals under Section 509(b)(1)(A). District court review of guideline regulations would thus result in a bifurcation of review between the two courts. (*Id.* at 1141, App. 249.) The court of appeals considered Congress had not affirmately expressed a desire for such a result, and concluded that Congress had not intended it. (*Id.*)

Judge Widener's approach to jurisdiction in *du Pont I* has considerable surface appeal. It allowed the court to avoid a ruling which sanctioned EPA's assertion that the Agency was authorized by implication to issue limitation regulations which

overrode the guideline regulations which the statute explicitly required be issued. At the same time, the court was able to preserve a series of review actions before it involving a considerable number of technical questions in which both the court and the parties had invested substantial time and effort. The court would consider many of the same technical arguments in any event in passing on EPA's new source standards for the same product subcategories involved in the existing-source guideline review actions.

Nonetheless, the "practical" considerations upon which the court of appeals relied so heavily in *du Pont I* should have a relatively limited role in construing the jurisdictional provisions of a statute. To their detriment, parties not before the court may have acted, or have failed to act, in reliance upon the ostensible meaning of a jurisdictional provision. As Mr. Justice Frankfurter put the matter, "in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946). See also *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968); *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, 135-138 (1940). Overall, the Court should strive to provide "[a] sensible reading of the jurisdictional provisions in the context of the substantive provisions to which they relate. . . ." *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc., supra*, 311 U.S. at 136.

The jurisdictional provisions in Section 509 have already caused considerable difficulty in a variety of factual situations, and a number of would-be litigants have discovered that they were in the wrong court.[77] The present situation would only be exacerbated by construing the Section to encompass administrative actions not "sensibly" read as being within one of the six categories specified by the Section's language.

[77] After a spate of such rulings, one commentator described the Act's jurisdictional provisions as "inscrutable":

> "A group of landowners downstream from a newly built sewage treatment plant learned a little about the inscrutable Federal Water Pollution Control Act as a federal district court ruled that the group's challenge to the plant's NPDES permit must be brought in the U.S. Court of Appeals. This marks the fourth time in recent months that a district or circuit court has ruled that the other court has jurisdiction to review EPA action taken under the Water Act."
>
> CCH, *Pollution Control Guide, Newsletter*, at 304 (June 10, 1975).

The four cases were *Sun Enterprises, Ltd.* v. *Train*, 394 F. Supp. 211 (S.D.N.Y. 1975); *CPC International Inc.* v. *Train*, 515 F.2d 1032 (8th Cir. 1975); *American Paper Institute* v. *Train*, 381 F. Supp. 553 (D.D.C. 1974); and the district court's decision in the present case.

In addition, the court of appeals in *du Pont I* was in error in evaluating one of the "practical difficulties" it said occurred with a straightforward reading of the Section. The court assumed that the new source standards would be issued at the same time and on the same record as the effluent guideline regulations. The court considered that it would be anomolous if review of the new source standards were in the court of appeals while review of the guideline regulations took place in the district court. (See 528 F.2d at 1141, App. 249.)

As the record shows in these cases, concurrent promulgation of both types of regulations was in fact what happened. But the Act itself did not contemplate simultaneous issuance of these two separate types of rules; the concurrent rulemaking effort was a product of EPA's internal policies. The Act mandated that EPA issue the guideline regulations under Section 304(b) within one year after enactment of the 1972 Amendments. (§ 304(b); see *supra* at 11.) In contrast, Section 306 gave EPA one year and seven months to develop and promulgate new source standards for this industry and for the other industries listed in Section 306(b)(1)(A). (See §§ 306(b)(1)(A) and 306(b)(1)(B).)[78] Under the timing prescribed in the Act, bifurcated review of the standards for new sources and the guideline regulations for existing sources does not cause the practical problem to which the court of appeals referred. Separate records would have been involved

[78] Periodic review of the regulations may also proceed on a different schedule. Section 304(b) calls for annual review of guideline regulations, while Section 306(b)(1)(A) provides that new source standards may be reviewed and revised "from time to time."

and indeed the two types of rules would have had entirely separate purposes.

4. *Section 509(b) contains harsh preclusion and limitation clauses and should not be construed expansively.*

The court of appeals also failed to consider countervailing practical difficulties arising from its decision. For example, Section 509(b)(2) forbids in enforcement actions the raising of a defense that regulations are invalid if review could have been had under Section 509(b)(1):

> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

Moreover, Section 509(b)(1) ordinarily allows review only if a petition is filed within 90 days after the Administrator's action:

> "Any such application [for review in the court of appeals] shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day."

These are harsh measures under any circumstances.[79] They are especially harsh for litigants who, upon reading the special

[79] The preclusion clause in Section 509(b)(2) is akin to a provision contained in the Emergency Price Control Act of 1942, which in *Yakus* v. *United States*, 321 U.S. 414 (1944), was upheld against a claim that it contravened guarantees provided by the Fifth and Seventh Amendments to the Constitution. Subsequent to the *Yakus* decision the Emergency Price Control Act was amended to ameliorate the effect of the preclusion clause. See Act of June 30, 1944, C. 325, Title I, § 107, 58 Stat. 639, amending 50 U.S.C.A. App. § 924.

Difficulty arises with the application of the time-limitation provision to guideline-regulations review actions because Section 509(b) on its face does not appear to apply to the Section 304(b) guideline regulations. Also, if Section 509(b) is construed to govern review of the existing-plant regulations, the 1983-step regulations may be reviewed "prematurely." *FMC Corp.* v. *Train*, ___ F.2d ___, 8 E.R.C. 1731, 1740 (4th Cir. 1976); *Tanners' Council of America, Inc.* v. *Train*, ___ F.2d ___, 8 E.R.C. 1881, 1886-1887 (4th Cir. 1976). See *supra*, at 80-82.

review provisions which did not mention regulations under Section 304(b), could not fairly conclude that the special review provisions applied to guideline regulations issued under Section 304.

Various pragmatic reasons for assigning review of informal rulemaking action to one court or another have been thoroughly discussed recently by both judges and commentators.[80] The discussion of such policy factors has, however, largely been confined to a consideration of reasons for Congress to write legislation in one fashion or another. In contrast, here the court of appeals considered such policy factors in reaching its decision, which in effect operates retroactively to deprive unsuspecting persons or groups of any review, given the aforementioned restrictions present in paragraphs 509(b)(1) and (2).

While the policy questions concerning the appropriate forum for review are quite important in a legislative context, they must have a restricted role in this case. The policy arguments should be made to Congress. See *Radzanower* v. *Touche, Ross & Co.*, ___ U.S. ___, 44 U.S.L.W. 4762, 4764 n. 12 (U.S. June 7, 1976). Congress, not the courts, decides the forum for review.[81] Construed fairly and sensibly, Section 509(b) does not govern or prescribe the forum for actions to review guideline regulations.

[80] *E.g.*, Judge Clark of the Fifth Circuit, writing in concurrence to that court's decision in *Texas* v. *Environmental Protection Agency*, 499 F.2d 289, 321-322 (5th Cir. 1974), called for district court review of regulations, emphasizing the ability of a trial judge to take evidence and to sift facts. In contrast, a recent article by Professors Currie and Goodman advocated that review of "important" regulations be had initially in the courts of appeals, because such regulations ordinarily would have broad and significant scope and because a correct decision was more likely in the courts of appeals by virtue of the collegial decision-making process. (See Currie and Goodman, *Judicial Review Of Federal Administrative Action: Quest for The Optimum Forum*, 75 Colum. L. Rev. 1, 53-54 (1975).)

[81] On June 3, 1976, the House of Representatives passed its version of S. 2710, 94th Cong., 1st Sess. (1975), a Bill which would amend the Act, entitled the "Federal Water Pollution Control Act Amendments of 1976." See 122 Cong. Rec. H5285-5288 (daily ed. June 3, 1976). The House-passed version of this bill would amend the Act to provide that review of guideline regulations issued under Section 304(b) will be had in courts of appeals under the terms of Section 509(b)(1). See *id.* at H5288 (Section 18 of the House-passed Bill).

B. Because Of The Past Uncertainty Over The Applicability Of Section 509(b)(1), This Court Should Construe The Act To Allow Courts Of Appeals To Take Pendent Jurisdiction To Review Guideline Regulations Where The Parties Seek Review Of Concurrently Issued New Source Standards

A number of courts of appeals and district courts have invested a substantial amount of judicial time in deciding actions brought to review EPA effluent regulations for various industrial categories. Similarly, the parties to these many cases have spent considerable time and resources in a good faith effort to obtain the judicial review of EPA's rulemaking actions which the Act promises will be available. The substantive rulings by courts in the review actions constitute a valuable contribution to the development of sound regulations and thus to an improved administration of the Act. These decisions need not be cast aside because of the past uncertainty over the application of the jurisdictional provisions in Section 509(b)(1).

With but two exceptions, courts of appeals have accepted jurisdiction of original proceedings to review guideline regulations in conjunction with review of new source standards promulgated by EPA in the same administrative proceeding and on the same record as the guideline regulations for the same individual category.[82] The instant case presents appropriate circumstances to examine whether the courts of appeals might properly be deemed to have taken pendent jurisdiction over review of the guideline-regulation aspects of the cases. In *Cheng Fan Kwok* v. *Immigration and Naturalization Service*,

[82] The two exceptions are *American Meat Institute* v. *Environmental Protection Agency*, 526 F.2d 442 (7th Cir. 1975), and *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, — F.2d —, 8 E.R.C. 1988 (2d Cir. 1976), where only effluent regulations for existing plants were challenged. The regulations at issue in the *American Meat Institute* case have also been challenged in a district court action where briefing has been had, a hearing has been held, and a decision is pending. *National Independent Meat Packers Ass'n* v. *Environmental Protection Agency*, Civil No. 75-0-369 (D.Neb., hearing held June 4, 1976). The *NRDC* case dealt only with the variance clause in a series of nine separate industrial category regulations. The substantive aspects of the regulations for many of these categories were involved in other cases.

392 U.S. 206, 216 n.16 (1968), this Court expressly noted but declined to decide whether a court of appeals with jurisdiction over one aspect of a deportation order might have "pendent jurisdiction" over a different segment of Immigration Service proceedings applicable to the same alien respecting which jurisdiction would ordinarily rest with a district court.

This Court's decision in *Romero* v. *International Terminal Co.*, 358 U.S. 354, 380-381 (1959), supports the exercise of pendent jurisdiction over a related federal claim. There the Court ruled that a district court has jurisdiction over claims based upon general maritime law pendent to its jurisdiction over claims under the Jones Act. By a parity of reasoning, this is an appropriate case for the exercise by the court of appeals of jurisdiction to review EPA's guideline regulations "pendent" to its jurisdiction to review new source standards promulgated in the same administrative proceeding and on the same record.

A ruling in favor of pendent jurisdiction in these cases would preserve the decision of the court of appeals in *du Pont II* respecting a series of eleven separate product subcategory regulations for the inorganic chemicals industry. It would do so on a basis which would serve the "practical" considerations of policy upon which the court of appeals relied in reaching its erroneous jurisdictional ruling in *du Pont I*. Yet, adoption of a pendent jurisdictional base for the review of guideline regulations would not involve expansion of Section 509(b)(1) beyond its explicit terms, because the review of guideline regulations would be pendent to, not pursuant to, review jurisdiction provided by Section 509(b)(1). As noted previously, an expansive reading of Section 509(b)(1) would carry with it the preclusion and limitation clauses. These clauses would not be invoked by reliance upon a pendent jurisdiction.

A ruling in favor of pendent jurisdiction would maintain the statutory scheme of review of guideline regulations in district courts, unless the parties affirmatively sought to invoke the pendent jurisdiction of a court of appeals. Thus, where an affected party sought to obtain review of guideline regulations only, such review would take place in a district court. See, *e.g.*, *Grain Processing Corp.* v. *Train*, 407 F. Supp. 96 (S.D.

Iowa 1976), *appeal pending* No. 76-1233 (8th Cir.). Moreover, reliance on district court jurisdiction would eliminate the problem created by premature review of the 1983-step regulations. There would be no precise limitation on the time within which the district court review action would have to be brought. Rather, laches would apply. Thus, the reviewing courts would be more comfortable in considering the 1983-step regulations at an appropriate time and not prematurely.

CONCLUSION

In its decisions in *du Pont I* and *du Pont II*, the Fourth Circuit sought to reach a compromise between the commands and prescriptions of the Act and the assertions of EPA. The court of appeals erred in its ruling as to the nature and effect of EPA's effluent regulations for existing plants. The court should have required compliance with the provisions of Sections 304(b), and should not have elided them from the statute in favor of impermissible implications and inferences not supported by the statutory language or by the legislative history of the 1972 Amendments.

Jurisdiction over review actions respecting EPA's guideline regulations ordinarily should be initially in the district courts and not the courts of appeals. In the circumstances of the present cases, however, where the guideline regulations were promulgated concurrently with the new source standards and on the same administrative record, the court of appeals in *du Pont II* properly may be deemed to have had pendent jurisdiction over the guideline review actions.

Based upon such a pendent jurisdiction, the judgment of the court of appeals in *du Pont I* respecting that court's jurisdiction should be remanded for the court of appeals to enter a judgment dismissing the appeal as moot. If pendent jurisdiction is not recognized and accepted by this Court, the decision of the court of appeals in *du Pont I* should be reversed, such that the district court would enter a new judgment upon initial review.

The jurisdiction of the court of appeals in *du Pont II* (before the Court in Nos. 75-1473 and 75-1705) should be upheld based

upon pendent jurisdiction over the petitions for review of guideline regulations. Because the court of appeals wrongly decided the statutory construction issues as to EPA's guideline regulations, the *du Pont II* decision should be reversed in part and remanded for entry of judgment in conformity with this Court's decision. Insofar as review of EPA's new source standards is concerned, the *du Pont II* decision should be affirmed for the reasons stated in the companion brief submitted in Nos. 75-1473 and 75-1705.

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